Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CLARK R. INGRAM, GEORGE M. INGRAM,
GARY C. INGRAM and GREGORY B. INGRAM,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourteenth Amendment right to due process of law is violated when a state agency holds a former surface mine operator liable for a pre-existing water quality problem at a mining site without showing that the operator caused the problem and where the operator had relied upon a prior state regulation which was in existence while all of his mining operations were conducted and completed and which made his operations lawful?

PARTIES TO THE PROCEEDING

In addition to petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram and respondent Commonwealth of Pennsylvania, Department of Environmental Resources, the parties to the proceeding before the Supreme Court of Pennsylvania were Henry L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel, and Rockwood Energy and Mineral Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners CLARK R. INGRAM, GEORGE M. INGRAM, GARY C. INGRAM and GREGORY B. INGRAM, by their attorneys, MacDonald, Illig, Jones & Britton, respectfully

request that a writ of certiorari issue to review the Order of the Supreme Court of Pennsylvania, entered May 19, 1992, denying the Petition for Allowance of Appeal on Behalf of Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram.

OPINIONS BELOW

There is no Opinion below of the Supreme Court of Pennsylvania in *Clark R. Ingram, et. al. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, No. 441 W.D. Allocatur Docket, 1991, with respect to the Order entered May 19, 1992, denying the Petition for Allowance of Appeal on Behalf of Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram. Entry of this Order is reported at 605 A.2d 257 (1992).

The Opinion below of the Commonwealth Court of Pennsylvania in *Clark R. Ingram, et. al. v. Department of Environmental Resources*, No. 1075 C.D. 1990, is reported at 141 Pa. Commw. Ct. 324, 595 A.2d 733 (1991).

The Opinion below of the Pennsylvania Environmental Hearing Board in *Ingram Coal Co., et. al. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 88-291-F (Consolidated Cases), is reported at 1990 EHB 395.

BASIS FOR JURISDICTION

The Order of the Supreme Court of Pennsylvania, denying the Petition for Allowance of Appeal on Behalf of Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram, was entered on May 19, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The federal constitutional provision involved is the United States Constitution, Amendment XIV, Section 1 which is set forth in Appendix D at page A-66.

The state statutory provision involved is Section 315(a) of the Pennsylvania Clean Streams Law, 35 P.S. § 691.315(a), which is set forth in Appendix E at pages A-67 to A-68.

The state regulatory provisions involved are Section 77.92(26) of the Regulations of the Pennsylvania Environmental Quality Board, 25 Pa. Code § 77.92(26), later renumbered and codified as Section 77.92(d)(8) of the Regulations of the Pennsylvania Environmental Quality

Board, 25 Pa. Code § 77.92(d) [rescinded, effective July 31, 1982, 12 Pa. Bull. 2382 (July 31, 1982)] and Section 87.102(a)(1), (2), (5) of the Regulations of the Pennsylvania Environmental Quality Board, 25 Pa. Code § 87.102(a)(1)(2) and (5), all of which are set forth in Appendix F at pages A-72 to A-76.

STATEMENT OF THE CASE

Summary of Facts. This case concerns a Compliance Order issued by respondent Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DER") against petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram (hereinafter "Ingrams") and others[1] on August 30, 1988, directing

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[1] The other parties against which the Compliance Order was issued were Rockwood Energy and Minerals Corporation, d/b/a Ingram Coal Company, (hereinafter "Remcorp") and Herman J.

that certain remedial action be taken for alleged violations of water quality standards at a coal surface mining site in Clarion County, Pennsylvania. DER issued the Compliance Order without any determination that Ingrams caused the water quality problems at the mining site and despite the fact that while Ingrams operated the site, the Pennsylvania Environmental Quality Board Regulations provided that a surface coal mine operator would not be held responsible for pre-existing water quality problems at a site.

Ingrams formed a surface mining business, known as "Ingram Coal Company," which was a partnership consisting of Clark R. Ingram and his sons, George M.

Israel, a/k/a H. J. Israel (hereinafter "Israel"). Israel died during the course of proceedings before the Pennsylvania Environmental Hearing Board (hereinafter "EHB"), and Henry L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel (hereinafter "Estate of Israel"), were substituted as parties.

Ingram, Gary C. Ingram and Gregory B. Ingram. In 1976, Ingrams applied to DER for a Mine Drainage Permit and a Mining Permit in order to surface mine a certain job at the Frenchville Site. Prior to the time that Ingrams commenced strip mining of coal at the Frenchville Site in late 1976, there were pre-existing springs or discharges in the area of the "southern toe of spoil." There also was evidence of earlier mining activity near the "southern toe of spoil."

During the course of the application procedure, DER and the Pennsylvania Fish Commission investigated the Frenchville Site and the surrounding area. This investigation and the pre-mining reports revealed that the water quality at the Site, including the area known as the "southern toe of spoil," did not meet DER standards prior to any mining by Ingrams. The investigation and pre-mining reports

further revealed that Deer Creek, into which drainage from the Site flowed, was an acid stream with no aquatic life present prior to any mining by Ingrams and was not used for water supplies, bathing, fishing, recreation or industrial uses. With this actual knowledge that the pre-existing water quality at the Frenchville Site did not meet DER standards, DER issued the Permits to Ingrams in accordance with existing state regulations.

During the period from 1976 to July 31, 1982, DER operated under Regulations of the Pennsylvania Environmental Quality Board, pursuant to which a surface coal mine operator such as Ingrams would not be held responsible for pre-existing water quality problems at a site unless his own mining operations made the discharge worse, either in quality or quantity. These Regulations were codified at 25 Pa. Code § 77.92(26) as of 1972 and

at 25 Pa. Code § 77.92(d)(8) as of 1982 and were communicated to Ingrams and other surface coal mine operators who relied upon the Regulations in applying for mining permits and in conducting their mining operations, including mining at the Frenchville Site.

After surface mining began at the Frenchville Site in late 1976, DER conducted numerous inspections of the mining activities, including several examinations of the water quality at the Site. At no time during the period from 1976 until the issuance of the DER Compliance Order in 1988, did DER issue any citation or other notice of violation to Ingrams, or to any other party, regarding the water quality at the Frenchville Site. To the contrary, DER recognized on several occasions that the water quality at the Site was not in violation because of its pre-existing condition before any mining

activity by Ingrams. For example, in Inspection Reports dated April 1, 1982, May 11, 1982, and May 18, 20, 1982, a DER Inspector made express reference to "southern toe of spoil" seeps which were "pre-existing."

As of May 28, 1982, there was no active mining on the Frenchville Site. Ingrams had filed a Completion Report and Amended Completion Report with DER in 1981, and reclamation of the Site was underway, including backfilling and replanting. On May 28, 1982, Ingrams sold their entire surface mining business -- Ingram Coal Company -- to Israel and Remcorp and ceased all involvement in the strip mining of coal. At that time, there were no outstanding DER violations with respect to the water quality at the Frenchville Site. All reclamation or other DER-related activities at the Frenchville Site from May 28, 1982, to the present were performed

by Israel and/or Remcorp, and not by Ingrams.

According to engineering testimony, surface mining activity by Ingrams prior to May 28, 1982, did not make the pre-existing water quality at the Frenchville Site worse, either in quality or quantity. DER admitted that the sole basis for issuance of the DER Compliance Order in 1988 was the then current Regulation of the Pennsylvania Environmental Quality Board at 25 Pa. Code § 87.102 which did not require a finding of causation and that DER did not give any consideration to pre-existing water quality at the Frenchville Site.

If DER had advised Ingrams at the time that Ingrams applied for the Mine Drainage Permit or the Mining Permit that DER would hold Ingrams responsible to correct the pre-existing water quality problems at the Site, regardless of any effect that their own mining had at the Site, Ingrams would

not have conducted any mining operations at the Site.

The Proceedings Below. The proceedings against Ingrams commenced on August 30, 1988 with the reissuance by DER of Compliance Order No. 88H057, as amended and restated, against Remcorp, Israel and Ingrams, alleging that certain discharges violated water quality standards set forth at 25 Pa. Code § 87.102(a)(1), (2) and (5) and directing that adequate treatment be implemented.[2]

Ingrams, along with Remcorp and Israel, filed appeals to the EHB, challenging the validity of the Compliance Order. As part of those appeal proceedings, Ingrams and DER each filed motions for summary judgment, supported by

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[2] DER initially issued Compliance Order No. 88H057 on June 29, 1988 against only Remcorp. Remcorp was the owner of Ingram Coal Company when the Compliance Order issued.

the record of a supersedeas hearing as well as by other supplemental filings. On April 17, 1990, prior to any final hearing on the merits, the EHB entered an Opinion and Order Sur Motion for Partial Summary Judgment, Cross-Motions for Summary Judgment and Motion to Dismiss which, in part, granted summary judgment in favor of DER against Ingrams and dismissed the appeal filed by Ingrams.[3] On April 27, 1990, the EHB amended the April 17, 1990 Order to correct typographical errors.

On May 17, 1990, Ingrams filed a Petition for Review with the Commonwealth Court of Pennsylvania, seeking a review of the EHB Order entered April 17, 1990.[4] By

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[3] The Order entered April 17, 1990 by the EHB also granted summary judgment in favor of DER against the Estate of Israel and dismissed the appeal filed by Israel.

[4] Estate of Israel also filed a Petition for Review with the Commonwealth Court of Pennsylvania which was consolidated with that of Ingrams. Remcorp intervened as a party to both appeals.

Opinion and Order entered July 19, 1991, the Commonwealth Court affirmed the EHB Order.

On August 19, 1991, Ingrams filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, seeking discretionary review of the Order of the Commonwealth Court of Pennsylvania entered on July 19, 1991.[5] By Order entered May 19, 1992, the Supreme Court of Pennsylvania denied Ingrams' Petition for Allowance of Appeal.

Raising of the Federal Question. In the proceedings before the EHB, Ingrams raised a federal constitutional question, based upon the United States Constitution, Amendment XIV, Section 1, in their

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[5] Estate of Israel filed a Cross-Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. This Cross-Petition also was denied by Order of the Supreme Court of Pennsylvania entered May 19, 1992.

Objections to DER Motion for Partial Summary Judgment or in the Alternative to Limit Issues and Cross-Motion for Summary Judgment on Behalf of Appellants Clark R. Ingram, Gary C. Ingram, George M. Ingram and Gregory B. Ingram and in their Brief in Support of Opposition to the DER Motion for Partial Summary Judgment or in the Alternative to Limit Issues and Cross-Motion for Summary Judgment on Behalf of Appellants Clark R. Ingram, Gary C. Ingram, George M. Ingram, excerpts of which are set forth in Appendix I at pages A-123 to A-135. The EHB considered, discussed and rejected Ingrams' constitutional argument in its Opinion and Order Sur Motion for Partial Summary Judgment, Cross-Motions for Summary Judgment and Motion to Dismiss entered April 17, 1990, which is set forth in Appendix C at pages A-29 to A-65.

In the proceedings before the Commonwealth Court of Pennsylvania, Ingrams

raised the federal constitutional question in their Brief for Petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram at No. 1075 and in their Reply Brief for Petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram at No. 1075 C.D. 1990, excerpts of which are set forth in Appendix H at pages A-94 to A-122. The Commonwealth Court of Pennsylvania considered, discussed and rejected Ingrams' constitutional argument in its Opinion and Order entered July 19, 1991, which is set forth in Appendix B at pages A-2 to A-28.

In the proceedings before the Supreme Court of Pennsylvania, Ingrams raised the federal constitutional question in their Petition for Allowance of Appeal on Behalf of Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram, excerpts of which are set forth in Appendix G at pages A-77 to A-93. The Supreme Court

of Pennsylvania considered the Petition for Allowance of Appeal, but declined to consider Ingrams' constitutional argument on the merits by its Order entered May 19, 1992, denying the Petition seeking discretionary review which is set forth in Appendix A at page A-1.

REASONS FOR GRANTING THE WRIT

This case presents important constitutional questions regarding a State's right to hold a person liable for conduct which was entirely legal and proper at the time it was performed, but became illegal only after the conduct had ceased. The Commonwealth Court of Pennsylvania held that Ingrams' constitutional right to due process of law was not violated when state officials affirmatively advised Ingrams that their conduct was legal, changed the law after the Ingrams' conduct had ceased,

and subsequently, held Ingrams liable because their past conduct now was deemed illegal. The Supreme Court of Pennsylvania then refused to exercise its discretion to review the Commonwealth Court decision. These Pennsylvania court decisions conflict with several decisions of this Court and seriously misconstrue the protections of due process of law under Amendment XIV, Section 1 of the United States Constitution.

1. The Commonwealth Court of Pennsylvania's decision upholding the constitutionality of the DER's application of new regulations to prior conduct conflicts with this Court's decisions in *Raley v. Ohio*, 360 U.S. 423 (1959), *Cox v. Louisiana*, 379 U.S. 559 (1965), and *Marks v. United States*, 430 U.S. 188 (1977).

The Commonwealth Court of Pennsylvania, in concluding that DER's application of new state regulations to

prior conduct was not a violation of Ingrams right to due process of law, failed to follow this Court's decisions in *Raley*, *Cox* and *Marks*. In all three of these cases, the Court held that the Due Process Clause of the Fifth or Fourteenth Amendments provides protection to defendants who act in accord with state law or regulations, and who then are prosecuted for those actions at a later time under new, stricter laws or regulations. These decisions are fully applicable to the present case, but were ignored by the Commonwealth Court of Pennsylvania and subsequently by the Supreme Court of Pennsylvania, thus allowing the Commonwealth of Pennsylvania to deprive Ingrams of their constitutional right to due process.

In both *Raley* and *Cox*, a government official had assured a defendant that certain conduct was legal, and the

defendant reasonably relied upon that advice and continued or initiated the conduct. Subsequently, the defendant was convicted for doing the very act which he had been advised was legal. This Court held that such a conviction is not permitted by the Due Process Clause, reasoning that to uphold the convictions:

> ". . . would be to sanction an indefensible sort of entrapment by the State - convicting a citizen for exercising a privilege which the State had clearly told him was available to him."

Raley, 360 U.S. at 426; *Cox*, 379 U.S. at 571.

In *Marks*, this Court held that the Due Process Clause precluded application of a newer, stricter obscenity standard, which had been announced by the Court after the defendants had performed the conduct with which they were charged, to the defendants because they did not have "fair warning" that their conduct was illegal. *Marks*, 430

U.S. at 195-196. See also *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Rabe v. Washington*, 405 U.S. 313 (1972). The *Marks* line of cases recognizes another element of a defendant's right to due process, similar to, but slightly broader than the "entrapment" principle of *Raley* and *Cox*, i.e. a defendant cannot be held liable for violation of a law when he had no fair warning or notice that his conduct was illegal.[6]

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[6] *Raley*, *Cox* and *Marks* were all criminal cases, but the due process principles enunciated therein have been applied in civil suits by the lower federal courts. See, e.g., *International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Brock*, 783 F.2d 237, 248 (D.C. Cir. 1986); *Morrison v. U.S. Dept. of Labor*, 713 F. Supp. 664, 675 (S.D. N.Y. 1989); *Kratz v. Kratz*, 477 F. Supp. 463, 483 (E.D. Pa. 1979). In extending application of the *Raley*, *Cox* and *Marks* decisions to a civil case, the *Kratz* court relied in part on the fact that the statute which the *Kratz* defendants were accused of violating contained criminal as well as civil penalties. *Kratz*, 477 F. Supp. at 483. In the present case, the statute under which Pennsylvania seeks to punish Ingrams. Section 315(a) of the Clean Streams Law, 35 P.S. § 691.315(a), is in large part a criminal statute, subjecting violators to imprisonment for up to two years and fines of up to $50,000.00. 35 P.S. § 691.602(c); 35 P.S. § 691.605(a).

The present case presents a compelling circumstance in which to apply the rules of *Raley*, *Cox* and *Marks*. Ingrams are accused of violating Section 315(a) of Pennsylvania's Clean Streams Law, 35 P.S. § 691.315(a), which provides, in relevant part:

> No person shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department . . .. [Emphasis added].

During the entire time the Ingrams mined the Frenchville Site, DER operated under the following state regulation:

> "The operator shall take the necessary steps to eliminate, if possible, any gravity drains from previous mining. Any drainage so encountered shall be treated to neutrality during the period of corrective action and during the life of the operation. The operator shall be responsible for any additional pollution load." [Emphasis added].

25 Pa. Code § 77.92(26)(1972), later codified at 25 Pa. Code § 77.92(d)(8)(1982).

This state regulation notified surface mine operators, such as Ingrams, that they would not be liable for discharges at a mining site unless their own mining operations added to the pollution load. The state regulation, moreover, was interpreted and applied in just this fashion by the Pennsylvania officials charged with overseeing the operation of surface mines, as established by the Affidavit of J. Anthony Ercole, the Director of DER's Bureau of Surface Mining Reclamation from 1977 to 1983, who testified:

> This Regulation of 25 Pa. Code Section 77.92 embodied the official policy and practice of the Department of Environmental Resources not to hold surface coal mine operators responsible for mine discharges existing from prior mining, after the life of the operator's mining, whether

> the discharges were on or off the operator's permit area, unless the operator made the discharge worse either in quality or quantity as a result of his own mining.

The record also is replete with affirmative actions taken by DER officials which confirmed the existing rule that Ingrams would be held liable only if their own surface mining activity increased any pollution emanating from a mining site and not for pre-existing discharges.

Finally, it is undisputed that Ingrams relied upon the state regulations and the representations and actions of DER officials in applying for mining permits and conducting mining operations, including mining at the Frenchville Site. If DER had advised Ingrams at the time that Ingrams applied for its mining permits that Ingrams would be held responsible to correct the pre-existing water quality problems at the Site, regardless of any effect that their

own mining had at the Site, Ingrams would not have conducted any such mining operations.

These facts reveal that DER violated the due process rights of Ingrams when DER issued its Compliance Order requiring the Ingrams to remediate a problem which existed before Ingrams possessed the site, which the Ingrams did not cause and which DER had affirmatively represented to Ingrams would not be a basis for liablity. Here the Ingrams were specifically advised by the responsible government authority, through statute, regulation, affirmation and action, that their conduct was entirely legal and consistent with then-applicable law. Thus, Ingrams had every reason to believe their actions were permissible. To now hold Ingrams liable for prior surface mining operations is precisely the kind of "entrapment" which the Court found unconstitutional in *Raley* and *Cox*, as well

as the sort of conviction without fair warning deemed impermissible in *Marks*.

2. The Commonwealth Court of Pennsylvania's decision that DER's application of new, stricter regulations to conduct performed prior to enactment of the new regulations conflicts with this Court's decisions regarding the constitutionality of retroactive laws.

During the entire time that Ingrams operated the Frenchville Site and until the sale of their business in May of 1982, the discharges emanating from the Frenchville Site were in total compliance with applicable state regulations. These regulations, however, were rescinded on July 31, 1982 and replaced with new, more stringent regulations. In 1988, DER issued its Compliance Order, attempting to hold Ingrams liable based upon the newer state

regulations and with no consideration as to whether Ingrams caused the discharges.

DER's action clearly is a retroactive application of the law because Ingrams have been called to account for their previously lawful conduct.[7] Retroactive legislation has not been favored by this Court:

> ". . . [R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects. 'It does not follow . . . that what Congress can legislate prospectively it can legislate

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[7] The Commonwealth Court of Pennsylvania wrongly determined that the application of new state regulations to Ingrams past conduct was not a retroactive application of the regulations.

> "A rule has retroactive effect if 'an act lawful at the time it was done' is 'rendered unlawful and the actor called to account for a completed, now condemned deed in the halls of justice.' *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1127 (D.C. Cir. 1985). In other words, a retroactive rule is one that alters the *past* legal consequences of past actions. *Bowen* [*v. Georgetown University Hospital*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring)].

American Mining Congress v. United States Environmental Protection Agency, 965 F.2d 759, 769 (9th Cir. 1992).

> retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.'"

Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 730 (1984), citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976).

The due process test which this Court has applied to retroactive legislation is that the retroactive effect of the rule must be justified by a rational legislative purpose and not be particularly arbitrary, harsh or oppressive. *Pension Benefit Guaranty Corp.*, 467 U.S. at 730, 733. The limits of due process are exceeded when the retroactive effects of the law are "so wholly unexpected and disruptive that harsh and oppressive consequences follow . . .." *Hazelwood Chronic & Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th

Cir. 1976), vacated on other grounds, 430 U.S. 952 (1977).

In determining if the retroactivity is unreasonable, arbitrary, harsh or oppressive, the defendant's reliance on the pre-existing state of the law must be considered. *Marks v. United States*, 430 U.S. 188, 195-196 (1977); *Cox v. Louisiana*, 379 U.S. 559, 571 (1965); *Raley v. Ohio*, 360 U.S. 423, 426 (1959). See also *Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L.R. 692, 727 (1960). The justification for retroactive legislation must also take into account the possibility that the defendant acted in reliance on the law in place at the time of the subject conduct and that the defendant may have altered his conduct to reduce liability if he had reason to anticipate the future imposition of liability. See *Welch v. Henry*, 305 U.S. 134, 147 (1938).

Applying this constitutional test to the state regulations in this case leaves little doubt that Ingrams' right to due process has been violated. First, as noted above, it is undisputed that Ingrams relied to their detriment on the state statute and regulations extant at the time of their mining operations. Clark Ingram testified, without contradiction, that Ingrams relied upon the statute and regulations, as well as the representations and actions of DER officials, in applying for mining permits and conducting mining operations at the Frenchville Site. He also affirmed that if DER had advised Ingrams that they would be held responsible for the pre-existing water quality problems at the Site, regardless of any effect their own mining had on the water quality, Ingrams would not have conducted mining operations at the Site. Under *Raley*, *Cox* and *Marks*, this fact weighs heavily against the

constitutionality of retroactive application of the Clean Streams Law and its Regulations.

DER's attempt to retroactively apply the law and their regulations. DER's attempt to apply new standards to Ingrams' past conduct seeks to hold Ingrams absolutely liable for conditions on the prior mining site despite the absence of evidence that Ingrams caused any of the pollution. Imposition of strict liability without causation is a departure from traditional concepts of liability under tort law. W. P. KEETON, PROSSER AND KEETON ON TORTS § 75 (5th Ed. 1984). - Not only does the Commonwealth Court of Pennsylvania impose liability upon Ingrams without fault, as in a typical "strict liability" case, but also the Commonwealth Court goes one step further and imposes strict liability without causation. W. P. KEETON, PROSSER AND KEETON ON TORTS § 75 (5th Ed.

1984). The harsh effects of strict liability without causation are clear enough, but to impose such liability retroactively with no fair warning of such a departure from traditional legal concepts is so harsh and oppressive as to offend due process.

This Court has long recognized that the Due Process Clause was intended to protect the individual from the arbitrary exercise of the powers of government. *Hurtado v. California*, 110 U.S. 516 (1884). By permitting DER to retroactively apply Pennsylvania law and regulations, the Commonwealth Court of Pennsylvania has misinterpreted, misapplied and ignored precedents of this Court regarding Ingrams' right to due process of law under Amendment XIV, Section 1 of the United States Constitution, and the Supreme Court of Pennsylvania has failed to protect Ingrams' constitutional rights by denying their

Petition for Allowance of Appeal. Thus, this Court should grant certiorari to correct this manifest injustice.

CONCLUSION

For the reasons set forth above, petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

ORDER OF SUPREME COURT
OF PENNSYLVANIA AT
NO. 441 W.D. ALLOCATUR DOCKET, 1991

IN THE SUPREME COURT OF PENNSYLVANIA

CLARK R. INGRAM, GEORGE M. INGRAM, GARY C. INGRAM and GREGORY B. INGRAM, Petitioners	)	
v.	)	No. 441 W.D. ALLOCATUR DOCKET, 1991
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Respondent	)	

ORDER

May 19, 1992

Petition Denied

Per Curiam

APPENDIX B

OPINION AND ORDER OF COMMONWEALTH COURT OF PENNSYLVANIA AT NO. 1075 C.D. 1990 AND NO. 1091 C.D. 1990 (CONSOLIDATED CASES)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CLARK R. INGRAM, GEORGE M. INGRAM, GARY C. INGRAM and GREGORY B. INGRAM, Petitioners	)	
v.	)	No. 1075 C.D. 1990
DEPARTMENT OF ENVIRONMENTAL RESOURCES, Respondent	)	
INGRAM COAL COMPANY, HENRY L. ISRAEL and BETTY ANN TAYLOR, personal representatives of the Estate of HERMAN J. ISRAEL, and ROCKWOOD ENERGY MANAGEMENT CO., Petitioners	)	
v.	)	No. 1091 C.D. 1990 ARGUED: April 29, 1991
DEPARTMENT OF ENVIRONMENTAL RESOURCES, Respondent	)	

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE ALEXANDER F. BARBIERI, Senior Judge

OPINION BY SENIOR JUDGE BARBIERI
Filed: July 19, 1991

These two petitions for review arise from an order of the Environmental Hearing Board (EHB) dated April 17, 1990, as amended on April 27, 1990. At issue before EHB, and before this Court, is a compliance order issued by the Department of Environmental Resources (DER) relating to abatement of discharges entering a stream from a surface mining site. Before addressing the issues raised in each petition, we shall set forth the factual background necessary for our discussion.

The surface mining site in question is a 42 acre area located near the community of Frenchville in Girard Township, Clearfield County. The site encompasses a

stream which is an unnamed tributary of Deer Creek. Mining and mine drainage permits for the site were issued by DER in 1976 to an entity known as Ingram Coal Company.

On June 29, 1988, DER issued a compliance order (at Docket No. 88H057) citing Ingram Coal Company for acid mine discharges flowing into the unnamed stream from the surface mining site.[1] The compliance order directed Ingram Coal Company, as operator of the site, (1) to immediately provide adequate treatment to insure that all discharges from the site met the effluent limitations set forth at 25 Pa. Code § 87.102, and (2) to submit to DER, for its approval, a plan and schedule for providing acceptable treatment or

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[1] The compliance order indicated that these discharges were in violation of DER regulations set forth at 25 Pa. Code § 87.102(a)(1), (2) and (5).

abatement of the discharge so as to achieve compliance with 25 Pa. Code § 87.102. The compliance order also set a "required abatement date" of August 2, 1988 for undertaking these corrective actions.

Ingram Coal Company is presently owned and operated by Rockwood Energy and Minerals Corporation (Rockwood), which filed a notice of appeal with EHB from this DER compliance order. Stating the basis for its appeal, Rockwood, d/b/a Ingram Coal Company, averred that it was not the proper party to be made subject to the compliance order because it was not the holder of the mine drainage permit (No. 4576SM4) referred to in the order. It was averred that Ingram Coal Company was originally owned by a partnership comprised of Clark R. Ingram and his sons George, Gary and Gregory, and that DER Permit No. 4576SM4 was issued to this Ingram Partnership. It was further averred that, in 1982, Herman J. Israel

purchased the license to use the name "Ingram Coal Company" from the Ingram Partnership -and that Rockwood, in turn, later purchased the license to use this name from Herman J. Israel. However, neither purchase included the DER mine drainage permit issued to the Ingram Partnership. Rockwood/Ingram Coal Company also requested that EHB issue a supersedeas, staying the requirements of the compliance order.

On August 20, 1988, DER issued an order amending its compliance order at Docket No. 88H507 to, inter alia, identify as operators Clark, George, Gary and Gregory Ingram, and Herman J. Israel. This amended order also changed the required abatement date to October 5, 1988. The amended compliance order was then issued to all parties identified as operators. Appeals from this amended order were filed with EHB by Rockwood, the Ingrams and

Herman J. Israel, all of which were consolidated for proceedings before EHB. All of these parties also filed petitions for supersedeas of the amended compliance order.

EHB member William A. Roth presided over a supersedeas hearing in this matter on January 25, 26, 27, 30 and 31, 1989. EHB granted supersedeas to Rockwood, but denied supersedeas to the Ingrams and Israel. Subsequently, DER filed with EHB a motion for summary judgment against the Ingrams and Israel. The Ingrams and Rockwood also filed separate motions for summary judgment against DER.[2]

To complicate matters further, on September 28, 1989, Herman J. Israel died. Shortly afterwards, a motion to dismiss

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[2] The authority of EHB to enter summary judgment was recently affirmed by this Court in Snyder v. Department of Environmental Resources, ___ Pa. Commonwealth Ct. ___, 588 A.2d 1001 (1991).

DER's action against Herman J. Israel was filed with EHB by Israel's attorney, alleging that, as a result of Israel's death, the amended compliance order was no longer valid as it related to Israel. DER and the Ingrams filed separate objections to this motion to dismiss, and requested, instead, that EHB act to substitute as parties in this matter the personal representatives of Herman J. Israel's estate, who are Henry L. Israel and Betty Ann Taylor.

On April 17, 1990, EHB issued the order which is the subject of these petitions for review. In its order, EHB: (1) denied the motion to dismiss DER's action against Herman J. Israel, and granted the request to substitute the personal representatives of Herman J.

Israel as parties in this matter;[3] (2) granted DER's motion for summary judgment against the Ingrams and the personal representatives of Herman J. Israel; (3) denied the motions for summary judgment filed by the Ingrams and Rockwood; and (4) dismissed the administrative appeals filed on behalf of the Ingrams and Herman J. Israel. Petitions for review were consolidated for oral argument, and are presently before this Court for disposition.[4]

Before proceeding further, we note that DER claims as legal authority for

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3 On April 27, 1990, EHB issued a second order amending and correcting its order of April 17, 1990, because it incorrectly identified one of the personal representatives as "Herman" L. Israel, rather than as Henry L. Israel. In all other respects, the order of April 17, 1990 was unchanged.

4 A stay of EHB's order pending disposition of this matter was granted to the Ingrams and the Estate of Israel by order of this Court dated July 5, 1990.

issuance of its compliance order to all of the parties involved in this action the language of Section 315(a) of the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.315(a), commonly referred to as the Clean Streams Law. The pertinent language of this statutory provision reads as follows:

> No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department [DER] or such person or municipality has first obtained a permit from the department. Operation of the mine shall include preparatory work in connection with the opening or reopening of a mine, refuse disposal, backfilling, sealing, and other closing procedures, and any other work done on land or water in connection with the mine. A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1 1966, under circumstances requiring a permit . . . under the provisions of section 315(b) of this act

> . . . . The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the department, is hereby declared to be a nuisance . . . .[5]

35 P.S. § 691.315(a).

Having set forth this factual background, we now turn to the issues raised in these petitions for review.

I.

The first petition for review which we shall address is that brought by the Ingrams, which raises two issues for our consideration.

Initially, the Ingrams contend that DER should be estopped from seeking to

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[5] The language of Section 315(a) just quoted was enacted in a 1980 amendment to the Clean Streams Law. However, this language is virtually identical to the previous language of Section 315(a) enacted in 1970.

enforce its compliance order against them based on the equitable doctrines of detrimental reliance and laches. The Ingrams note that they operated and owned the mine site only for the time period from 1976 to 1982, while DER did not issue its compliance order until 1988. The Ingrams also point out that DER knew that the water quality of the unnamed tributary of Deer Creek, which this action concerns, failed to meet DER water quality standards throughout that 12 year time period (1976-1988). Yet, DER issued no compliance order to the Ingrams until well after they had ceased surface mining operations and sold the site.

The Pennsylvania Supreme Court considered similar estoppel and laches defenses raised by a coal mine operator charged with a violation of the Clean Streams Law in Commonwealth v. Barnes & Tucker Company, 455 Pa. 392, 319 A.2d 871

(1974). The Supreme Court dismissed the operator's attempts to raise such defenses, noting that the Clean Streams Law, itself, at Section 701, proclaims that the purpose of the statute is "to provide additional and cumulative remedies to abate the pollution of the waters of this Commonwealth," and that this section goes on to state, "nor shall any provision in this act, or the granting of any permit under this act, or any act done by virtue of this act, be construed as estopping the Commonwealth . . . from proceeding . . . to abate any pollution now or hereafter existing . . .." See 35 P.S. § 691.701. Taking into account this provision and previous case law, the Supreme Court enunciated a broad principle in Barnes & Tucker that "stream polluters can acquire no prescriptive or property right to pollute as against the Commonwealth no

matter how long their conduct has been tolerated." Id. at 415, 319 A.2d at 884.

Following this instructive reasoning, we find no merit in the Ingrams' assertions that DER should be estopped from requiring that they now take action to abate the continuing pollution of the Deer Creek tributary. The Ingrams acknowledge that periodic water quality sampling at the mine site since 1976 confirmed that the water quality did not meet DER standards. Basically, the Ingrams take the position that, since DER knew of this violation from its water quality standards and failed to take immediate action to abate the pollution causing it, DER should be estopped from taking such action now. It is, indeed, unfortunate that DER permitted pollution of this stream to occur unabated for so many years; however, the Ingrams cannot escape responsibility for having allowed discharges to occur by arguing that

DER took too long to act, or that they have relied to their detriment on DER's past inaction. Accepting the Ingrams' position would require this Court to ignore the language of Section 701, and ignore the broader purpose which the Clean Streams Law is meant to achieve. See Barnes & Tucker. Under these circumstances, we find no merit in the Ingrams' initial allegation of error by EHB.

The Ingrams' second and final issue is a allegation that DER is attempting to retroactively apply current DER regulations to the Ingrams, which regulations are allegedly contrary to DER policy and regulations in effect from 1976-1982. The Ingrams contend that such a retroactive application of current DER regulations is unconstitutional.

We do not find that DER is attempting to retroactively apply its regulations to the Ingrams. The stream pollution which

emanates from the Frenchville site formerly mined by the Ingrams is a continuous and ongoing occurrence. In issuing its compliance order in 1988, DER was applying current regulations to a current violation of Section 315(a) of the Clean Streams Law. DER's order was not an attempt to retroactively apply a regulation. Therefore, the Ingrams' petition is untenable.[6]

In summary, we find no merit in the allegations of error raised by the Ingrams' petition for review. Accordingly, we will affirm the order of EHB insofar as its

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[6] As part of this second issue, the Ingrams also make a claim that it was error for EHB to interpret Section 315(a) in a manner that allowed for strict liability against the Ingrams, as former operators of a mine site emitting a discharge into a stream, without proof of causation of the pollution to be abated. However, this Court has held that demonstration of a causal link is not a prerequisite for imposition of liability under Section 315(a). Thompson & Phillips Clay Company v. Department of Environmental Resources, ___ Pa. Commonwealth Ct. ___, 582 A.2d 1162 (1990). Thus, we find no merit to this allegation of error.

entry of summary judgment for DER and against Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram, and insofar as its dismissal of the Ingrams' appeal of DER's compliance order to EHB.

II.

The second petition for review before us concerns the effect of EHB's order on the estate and personal representatives of Herman J. Israel. Initially, several procedural issues are raised which we must address.

This petition for review was filed on behalf of "the Estate of Herman J. Israel, deceased." DER requests that this Court quash the petition on grounds that an estate lacks the capacity to institute legal proceedings, thus rendering this petition for review a nullity ab initio. Although this question was previously

presented to a single judge of this Court, the Hon. William W. Lipsitt, who denied DER's motion to quash by order dated July 5, 1990, DER argues that the question goes to our jurisdiction, and therefore may again be raised at this stage of the proceedings.

DER has cited several pertinent cases which support its position the suits by or against an estate must be brought by or against the personal representatives of the estate. See, e.g., Wilkes-Barre General Hospital v. Lesho, 62 Pa. Commonwealth Ct. 222, 435 A.2d 1340 (1981). Our appellate rules also provide for substitution of the personal representative of a deceased party. See Pennsylvania Rule of Appellate Procedure (Pa. R.A.P.) 502(a). However, we do not agree with DER's position that filing of this petition for review on behalf of the estate, rather than the personal representatives, raises an issue

which goes to our jurisdiction. There is no question that this Court has jurisdiction over a petition for review of a final order of EHB. And there is no dispute that the order of EHB substituted the personal representatives of Herman J. Israel, rather than the estate of Herman J. Israel, as parties in this matter. While it was improper for the petition for review to be filed on behalf of the estate, we do not view this error as being one which deprives this Court of jurisdiction to consider the petition.

The practical effect of Judge Lipsitt's order was to amend the caption of this petition to reflect the names of the estate's personal representatives. DER does not, and could not reasonably, argue that it has been prejudiced as a result of Judge Lipsitt's order. Moreover, we remind DER that it is the policy of this Court that when no petition for reconsideration

from an order of a single judge has been filed, as is the case here, that order will normally be considered binding. Larocca v. Workmen's Compensation Appeal Board (The Pittsburgh Press), ___ Pa. Commonwealth Ct. ___, ___ A.2d ___ (No. 254 C.D. 1990, filed May 31, 1991).[7] Considering these circumstances, we will not act now to quash this petition for review.

The personal representatives of the Israel estate (hereinafter Israel Petitioners) present four issues in their petition. The first issue raises a question as to whether EHB has authority to effectuate the substitution of the personal representatives of a deceased party as parties in a proceeding before EHB, and if so, whether the procedure used to

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[7] As noted in Larocca, at footnote 1, we have approved this practice even in a case involving a jurisdictional issue. City of Reading v. Templin, 88 Pa. Commonwealth Ct. 267, 269, n.3, 489 A.2d 272, 273, n.3 (1985).

effectuate that substitution in this instance was proper. Second, Israel Petitioners contend that the compliance action brought by DER is not the type of action which survives a decedent against whom such action has been brought. DER contends that these two issues have been waived because they were not raised before EHB, and therefore are not preserved for appellate review. After examination of the record, we agree with DER's position that these two issues have been waived.

The record indicates that a motion to dismiss DER's action against Israel, dated September 29, 1989, was filed by counsel a few days after Israel's death. DER's objections to this motion to dismiss are dated November 6, 1989. In its objection, DER avers that letters testamentary were granted to the personal representatives of the Israel estate on or about October 6, 1989. The Ingrams filed a similar

objection dated November 7, 1989, also averring that Israel Petitioners had been granted letters testamentary. Certificates of service attached to both sets of objections indicate that service was made on counsel for the estate, now representing Israel Petitioners in this matter. The record reveals no responsive pleading or motion filed by Israel Petitioners opposing the requests that they be substituted as parties in this matter, or raising before EHB these two issues which they now wish to present to this Court. Accordingly, we find that Israel Petitioners have waived these issues, see Pa.R.A.P. 1551, and we will not address them.

Israel Petitioners' remaining two issues concern the merits of DER's compliance order. Israel Petitioners argue that EHB erred in granting summary judgment because genuine issues of material fact remain unresolved regarding whether Israel

conducted mining or mine reclamation activities at the site. Israel Petitioners also contend that Israel was not an "operator" of a mine as that term is used in the Clean Streams Law and the Surface Mining Conservation and Reclamation Act,[8] and therefore cannot be made subject to DER's compliance order. EHB found that Israel was an operator within the meaning of the Clean Streams Law, and that no material issues of fact were in dispute.

Section 315(a) of the Clean Streams Law is, by its own terms, applicable to any person who "shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth." 35 P.S. § 691.315(a) (emphasis added). There is no factual dispute that discharges from the Frenchville mine site entered into the waters of the Commonwealth during the time

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[8] Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §§1396.1-1396.31.

period in which Israel owned the site, from 1982-1984. Thus, regardless of whether Israel conducted any mining activities at this site, or might be considered a mine "operator" as that term is used in the acts cited by Israel Petitioners, there is no dispute that during the time period Israel owned the Frenchville site he allowed discharges from that site to enter waters of the Commonwealth. Periodic water samples taken during that time period indicate that such discharges occurred. In allowing such discharges to occur, Israel violated the Clean Streams Law.

As we held in Thompson & Phillips (cited in full at n.6), liability under the Clean Streams Law is not founded in tort, but is based on the police power of the Commonwealth to enact legislation for the protection of the health, safety and welfare of its citizens. It is not necessary to establish a causal link

between mining activities and stream pollution for liability to attach under the Clean Streams Law. Israel's liability under Section 315(a) of the Clean Streams Law attached when he allowed discharges form the mine site to enter into the Deer Creek tributary, regardless of whether he conducted any mining activities there. Accordingly, we see no error in EHB's decision to enter summary judgment for DER.

Having found no merit to Israel Petitioners' allegations of error, we will affirm the order of EHB in its substitution of the personal representatives of the Estate of Herman H. Israel, namely Henry L. Israel and Betty Ann Taylor, as parties in this matter; in its entry of summary judgment for DER and against the personal representatives of the Estate of Herman J. Israel; and in its dismissal of Herman J.

Israel's appeal of DER's compliance order to EHB.

s/s Alexander F. Barbieri
ALEXANDER F. BARBIERI,
Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CLARK R. INGRAM, GEORGE M. INGRAM, GARY C. INGRAM and GREGORY B. INGRAM, Petitioners	)	
v.	)	No. 1075 C.D. 1990
DEPARTMENT OF ENVIRONMENTAL RESOURCES, Respondent	)	
INGRAM COAL COMPANY, HENRY L. ISRAEL and BETTY ANN TAYLOR, personal representatives of the Estate of HERMAN J. ISRAEL, and ROCKWOOD ENERGY MANAGEMENT CO., Petitioners	)	
v.	)	No. 1091 C.D. 1990 ARGUED: April 29, 1991
DEPARTMENT OF ENVIRONMENTAL RESOURCES, Respondent	)	

ORDER

AND NOW, July 19, 1991, the order of the Environmental Hearing Board in the

above-captioned petitions for review is hereby affirmed.

s/s Alexander F. Barbieri
ALEXANDER F. BARBIERI,
Senior Judge

APPENDIX C

OPINION, ORDER AND AMENDED ORDER OF PENNSYLVANIA ENVIRONMENTAL HEARING BOARD AT EHB DOCKET NO. 88-291-F (CONSOLIDATED CASES)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

INGRAM COAL COMPANY, et al.	)	
	)	EHB Docket No.
v.	)	88-291-F
	)	(Consolidated
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	)	Cases)
	)	Issued:
	)	April 17, 1990

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT,
CROSS-MOTIONS FOR SUMMARY JUDGMENT,
AND MOTION TO DISMISS

By: Terrence J. Fitzpatrick, Member

Synopsis

This is a consolidated proceeding involving three appeals from an order of the Department of Environmental Resources (DER) directing the Appellants to remedy acid mine discharges emanating from a mine site. We will grant DER's motion and enter summary judgment against two of the Appellants because they engaged in "operation of a mine," and, thus, they are responsible for the discharges on the site regardless of whether they caused the discharges. We will also deny the motion to dismiss filed by one of these Appellants, and grant DER's motion to substitute the personal representatives of the Appellant's estate. With regard to the third Appellant, there are unresolved factual questions regarding whether it engaged in "operation of a mine";

therefore, we will deny this Appellant's motion for summary judgment.

Opinion

This proceeding involves three appeals which have been consolidated for hearing. The Appellants are the "Ingram Partnership" (consisting of Clark R. Ingram, George M. Ingram, Gary C. Ingram, and Gregory B. Ingram), Herman J. Israel[9] (a sole proprietorship), and Rockwood Energy and Mineral Corporation.[10] At issue is a compliance order issued to the Appellants by DER on August 30, 1988,

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9 Mr. Israel died after this appeal was filed. As we will explain later in this Opinion, the representatives of the estate of Mr. Israel will be substituted for Mr. Israel.

10 DER contends that all three of these Appellants have, at different times, conducted business as "Ingram Coal Company" (DER Pre-hearing Memorandum, p. 2).

directing them to abate discharges from a surface mining site near the town of Frenchville in Girard Township, Clearfield County, Pennsylvania.

All three appellants filed petitions for supersedeas. On February 6, 1989, the Board issued an Order granting the petition of Rockwood, but denying the petitions of the Ingram Partnership and Israel. Subsequently, DER filed a motion for partial summary judgment (or, in the alternative, to limit issues) seeking summary judgment against Ingram Partnership and Israel. Both of these parties filed responses opposing this motion. The Ingram Partnership filed a cross-motion for summary judgment, which was opposed by the DER and Rockwood. Rockwood filed a motion for summary judgment which was opposed by the Ingram Partnership and DER. Finally, Israel filed a motion to dismiss, which was opposed by DER and the Ingram Partnership.

This Opinion and Order addresses all four of these motions.

Some of the facts in this case are undisputed. The Ingram Partnership secured two permits from DER in 1976 to mine the Frenchville site. Mining permit No. 1476-3 was issued on August 26, 1976; Mine Drainage Permit No. 4576SM4 was issued on May 6, 1976. The Ingram Partnership mined on the site from 1976 to 1980. From 1980 to 1982, the Ingram Partnership conducted reclamation and other post-mining activities at the site. In May, 1982, Ingram Partnership signed a purchase agreement with Israel, and Israel received the business known as "Ingram Coal Co." and certain assets of that company. At the same time, Ingram Partnership signed a purchase agreement with Rockwood by which

it transferred certain assets to Rockwood.[11]

Despite the sale of Ingram Coal Co., neither Israel nor the Ingram Partnership ever transferred the Permits under which mining was conducted at the Frenchville site.[12] After the sale, employees of Israel[13] completed work at DER's direction to remedy erosion and sedimentation problems at the site. Israel also continued a water monitoring program which was put in place when the Ingram Partnership had control of the site.

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[11] We are deleting many details regarding Israel and Rockwood which are not crucial to this Opinion. Suffice it to say that Israel was a stockholder in a parent company of Rockwood, and that there were agreements between Israel and Rockwood regarding the Frenchville site.

[12] Those permits were issued to the Ingram Partnership, doing business as Ingram Coal Co.

[13] Gary, George, and Gregory Ingram were employed by Israel following the transfer of the business to Israel.

Rockwood took control of Ingram Coal Company at some point in 1984, when it exercised an option to buy the company pursuant to an agreement with Israel signed in 1982.

The controversy here surrounds who should be held responsible for three acid mine discharges emanating from the Frenchville site. Two of these discharges are located at the southern toe of the affected area of the site. The other discharge is from a pipe in the sediment pond near the southeast corner of the affected area. These three discharges flow into an unnamed tributary of Deer Creek.

The Board has the authority to grant summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law." Summerdale Borough v. DER, 34 Pa. Commw. 574, 383 A.2d 1320, 1322 (1978). The Board must read a motion for summary judgment in the light most favorable to the non-moving party. Palisades Residents in Defense of the Environment v. DER, 1988 EHB 8, 10-11.

The motions which have been filed address the potential liability of each of the Appellants. We will address the legal arguments raised regarding each Appellant in a separate section.

1. Liability of Clark R. Ingram, Gary C. Ingram, George M. Ingram, and Gregory B. Ingram (the Ingram Partnership) for the Discharges.

DER and Ingram Partnership have both filed motions seeking summary judgment on the question of whether the Ingram Partnership is responsible for the

discharges. Each party, in turn, has responded to the other's motion.

DER argues that the Ingram Partnership was, and still is, the permittee for the Frenchville site, and that the discharges are emanating from the permitted area. DER contends that the Ingram partnership is "strictly liable" for the discharges under Section 315(a) of the Clean Streams Law, 35 P.S. § 691.315(a), regardless of whether the discharges preexisted the Partnership's mining or whether the Partnership's mining caused or affected the discharges, citing Bologna Mining Co. v. DER, 1989 EHB 270, Benjamin Coal Co. v. DER, 1987 EHB 402, William J. McIntire Coal Co. v. DER, 1986 EHB 712, affirmed, 108 Pa. Commonwealth Ct. 443, 530 A.2d 140 (1987), Hepburnia Coal Co. v. DER, 1986 EHB 563, 602.[14]

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[14] DER also argues, in the alternative, that Ingram Partnership's mining did cause or contribute to the discharges in question.

The Ingram Partnership raises a number of arguments why it is not legally responsible for the discharges and, thus, why its motion for summary judgment should be granted. First, it argues that there are no appellate court decisions in Pennsylvania which have held a mine operator liable for a discharge it did not cause, citing William J. McIntire Coal Co. v. Commonwealth, DER, 108 Pa. Commonwealth Ct. 443, 530 A.2d 140 (1987). Relying upon this lack of judicial precedent, Ingram Partnership contends that the Board precedents cited by DER, which held an operator liable regardless of causation, were incorrectly decided. Second, Ingram Partnership argues that DER is estopped from holding it responsible for any pre-existing discharge which it did not cause or contribute to, because DER's regulations which were in effect at the time Ingram conducted its mining (specifically, 25 Pa.

Code § 77.92(26), now repealed) only held an operator responsible for "any additional pollution load" which an operator added to a pre-existing discharge. Holding an operator responsible under these circumstances would allegedly violate the operator's right to due process of law. Third, Ingram Partnership argues that Herman Israel assumed the liability of Ingram Coal Co. upon the transfer of that business in 1982, and that Ingram Partnership was, accordingly, absolved of any liability. Finally, Ingram Partnership argues that the recent worsening of the discharges is attributable to unidentified parties who drilled test-holes on the site within the past few years (after the Partnership concluded its operation on the site), and that the Partnership cannot be held responsible for the actions of these third parties.

The first issue is whether Ingram Partnership can be held liable under Section 315(a) of the Clean Streams Law, 35 P.S. § 691.315(a), for a discharge from its permitted area which it did not cause. This section provides, in relevant part:

> (a) No person or municipality shall operate a mine or allow a discharge from a mine into waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department . . .. The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the department, is hereby declared to be a nuisance.

DER is correct that the Board has construed this language to hold an operator responsible for a discharge on its site regardless of whether the operator caused or contributed to the discharge. See e.g. Bologna Mining Co., Benjamin Coal Co.; McIntire Coal Co., Hepburnia Coal Co.,

supra. On the other hand, Ingram Partnership is correct that Pennsylvania's appellate courts have never held an operator liable under Section 315(a) where the operator did not cause the discharge. See William J. McIntire Coal Co. v. Commonwealth, DER, 108 Pa. Commonwealth Ct. 443, 530 A.2d 140 (1987). Furthermore, in McIntire, Commonwealth Court noted that causation was present in two judicial precedents which the Board had cited in support of finding liability without causation.[15] McIntire, 530 A.2d at 142-143.

For the reasons which follow, we reaffirm our previous holdings that an operator is responsible under Section 315 for any discharge emanating from its mine

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[15] These precedents are Commonwealth v. Barnes & Tucker Co. (Barnes & Tucker I), 455 Pa. 392, 319 A.2d 871 (1974), and Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 302 (1973).

site, regardless of whether the operator "caused" the discharge. See, Bologna, Benjamin, Hepburnia, McIntire, supra., see also, Yenzi v. DER, 1988 EHB 643, Adam Greece d/b/a Cherry Run Fuel Co. v. DER, 1980 EHB 135, Robert C. Penover v. DER, 1987 EHB 131, Hawk Contracting, Inc. & Adam Eidemiller, Inc. v. DER, 1981 EHB 150, 1973.

At the outset, we recognize that the liability imposed by Section 315 is a departure from traditional concepts of liability under tort law. In tort law, a finding of causation is required to establish a connection between the defendant's actions or omissions and the injury suffered. William Prosser, The Law of Torts, p. 236 (4th ed. 1971). Causation is required even in those areas of tort law where "strict liability" -- liability

without fault[16] -- is applied. See,

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16 There appears to be some confusion that "strict liability" -- liability without "fault" -- eliminates the requirement of causation. This confusion can be traced to the multiple meanings of the word "fault." Fault is best understood as a synonym for "negligence." This was the sense in which Superior Court used the term when it stated that: "The progress of the law in extending liability without fault.... [has not been] in disregard of fundamentals pertaining to the tort law of causation." Bascelli v. Randy, Inc., 339 Pa. Superior Ct. 254, 488 A.2d 1110 (1985), quoting from, Oehler v. Davis, 223 Pa. Superior Ct. 333, 334, 298 A.2d 895 (1972). This statement recognizes that under tort law, consideration of the defendant's mental state (whether he acted intentionally or negligently) is a separate consideration from whether he caused the injury; thus, liability depends upon showing that both the requisite mental state and causation are present. However, fault is sometimes used (perhaps less precisely) as a synonym for the broader concept of "responsibility" -- a term which is used interchangeably with "liability." For example, when a person did not cause the damage, he might argue that the damage was not his "fault." When understood in this way, dispensing with "fault" (i.e. strict liability) means dispensing with consideration of both the defendant's mental state and causation. Commonwealth Court has used the term "fault" in the latter sense. See Western Pennsylvania Water Co. v. Commonwealth, DER, ___ Pa. Commonwealth Ct. ___, 560 A.2d 905, 909 (1989). Since the terminology of fault and strict liability comes from tort law, we will use those terms with the same precision as in tort law. Thus, using the term "fault" as a synonym for "negligence," our holding that an operator is responsible for discharges he may not have caused cannot technically be justified by saying that we are imposing "strict liability" or "liability without fault" upon an operator. Liability without causation goes beyond these concepts. It is

Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975), Bascelli v. Randy, Inc., 339 Pa. Superior Ct. 254, 488 A.2d 1110 (1985), Oehler v. Davis, 223 Pa. Superior Ct. 333, 298 A.2d 895 1972). Federal courts have also interpreted federal statutes to require causation where a defendant may be held strictly liable for different types of pollution. See United States v. West of England Ship Owner's Mutual Protection and Indemnity Assoc., 872 F.2d 1192 (5th Cir. 1989), United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978), State of Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986).

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difficult to find a term in tort law to describe liability without causation - although this concept has been described as imposing an insurer's responsibility upon the operator. Adam Greece d/b/a Cherry Run Fuel Co. v. DER, 1980 EHB 135, 145 (Concurring Opinion). Whatever term is used to describe the concept, however, it is not entirely novel -- it has been applied by the Courts under Section 316 of the Clean Streams Law. *See*, footnote 9, *infra*.

The connection between the defendant and the injury suffered which is normally supplied by causation is not required in cases arising under Section 315, however, because that connection is supplied by the operator's relationship with the site which he mines. Section 315 imposes the duty upon an operator not to "allow" any discharge from his site. This is a higher duty than if the General Assembly had written that the operator may not "cause" any discharge.[17] The imposition of this higher duty is consistent with the objective of the Clean Streams Law:

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[17] This duty is similar to that imposed upon a landowner or occupier under Section 316 of the Clean Streams Law, 35 P.S. § 691.316. A landowner or occupier may be ordered to correct conditions on his land which are causing pollution regardless of whether he caused or created the conditions. National Wood Preserver's Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed, 449 U.S. 803, 101 S. Ct. 47, 6 L. Ed.2d 7 (1980), Western Pennsylvania Water Co. v. Commonwealth, DER, ___ Pa. Commonwealth Ct. ___, 560 A.2d 905 (1989).

> It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted.

35 P.S. § 691.4(3). The Supreme Court of Pennsylvania has relied upon this objective in deciding other cases where mine operators argued that it was unfair to hold them responsible for acid mine discharges. See Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308, 321 (1973), appeal dismissed, 415 U.S. 903 (1974), Commonwealth v. Barnes & Tucker Co. (Barnes & Tucker II), 472 Pa. 115, 371 A.2d 461, 465 (1977).

Moreover, while we do not casually dismiss the operator's argument of unfairness, it is evident that in the eyes of the General Assembly, the public policy consideration of the public's right to clean water overrode considerations of

individual unfairness. If operator were permitted to contest causation of a discharge, the public's right to unpolluted water would be severely impaired because acid mine pollution would continue while litigation ran its languorous course. This result would be contrary to both the remedial objective of the Clean Streams Law as well as Article I, Section 27 of the Pennsylvania Constitution.

We disagree with Ingram Partnership's argument that a finding of causation is required by Commonwealth Court's decision in William J. McIntire Coal Co. v. Commonwealth, DER, 108 Pa. Commonwealth Ct. 443, 530 A.2d 140 (1987). Commonwealth Court avoided the question of whether causation was required, because it found that the evidence supported a finding of causation. In addition, although Commonwealth Court pointed out that causation was present in Harmar and Barnes

& Tucker I; the Court did not hold that an operator could not be held liable without causation.[18]

We also disagree with Ingram Partnership's argument that DER is estopped from holding it liable for a pre-existing discharge because a DER regulation (25 Pa. Code § 77.92(26), now repealed) which was in force at the time the Partnership began mining provided that an operator was only responsible for any additional pollution load which he added to a pre-existing discharge. This issue was raised and

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[18] We agree that Harmar and Barnes & Tucker I did not resolve the precise issue presented here. In Harmar, the Court decided that an operator was required to treat all the water discharging from its mine, even though some (not all) of that water originated in an adjacent, abandoned mine. In Barnes & Tucker I, the Court held that an operator was liable for a post-mining discharge caused by its prior mining, even though the law in existence at the time the mining was conducted did not provide for liability for post-mining discharges. However, while these decisions are not "on all fours" with the present case, we do believe that the rationale employed by the Supreme Court supports our holding here.

decided against the operator in Bologna, supra, and we will reject the argument here. Ingram Partnership did not obtain an indefeasible right to allow a discharge from its site merely because such a discharge may have been tolerated when it conducted its mining. See Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974). Similarly, we reject Ingram Partnership's argument, based upon the repealed regulation, that holding it liable without causation would violate fundamental fairness and due process of law. The Partnership did not develop this argument in any significant detail. (See, Partnership's Brief filed November 22, 1989, p. 27). As we stated above, we do not take the Partnership's unfairness argument lightly; however, we must also consider the public's right to unpolluted water. Moreover, we believe that our conclusion is required by the language of

Section 315, and we lack the authority to find this statutory provision unconstitutional. St. Joe Minerals Corp. v. Goddard, 14 Pa. Commonwealth Ct. 624, 324 A.2d 800 (1974).

In addition, we disagree with Ingram Partnership's argument that it was absolved of future liability because its agreement with Herman Israel provided that Israel assumed the liabilities of Ingram Coal Co. upon the transfer of the company to Israel. The permit was issued to Ingram Partnership. A permittee cannot, by private agreement, delegate duties imposed upon it by statute. Morcoal Co. v. Commonwealth, DER, 74 Pa. Commonwealth Ct. 108, 459 A.2d 1303 (1983). As the permittee, Ingram Partnership had responsibility for the site and it could not shift this burden to Israel via a private agreement.

Ingram Partnership's final argument is that it cannot be held liable for the discharges because the recent worsening of the discharges is attributable to the actions of third parties who drilled testholes on the site after the Partnership ceased its mining activities.[19] DER counters this "drill-hole theory" by arguing that water sample test results show that at least one of the discharges was degraded as early as 1980 -- long before the alleged drilling occurred.

DER's argument raises a factual issue, which would require a hearing to resolve. However, we find that Ingram Partnership's argument must be rejected as a matter of law. As we concluded above, Section 315(a) barred Ingram Partnership from allowing any

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[19] This argument seems to be supplemental to the Partnership's argument that the discharges pre-existed the Partnership's mining on the site.

discharge from its mining site. Ingram Partnership remains responsible for the Frenchville site because it never obtained a release of its responsibility from DER. Even if we concede that third parties entered the site and drilled testholes which caused the discharges -- Ingram Partnership is still responsible for those discharges under Section 315(a). See, Adam Greece d/b/a Cherry Run Fuel Co. v. DER, 1980 EHB 135, John E. Kaites, et al. v. DER, 1985 EHB 625. This result is inescapable because, as we stated above, the liability of an operator under Section 315(a) is predicated not upon causation, but upon the operator's relationship with the land it mines. As the Board noted in Adam Greece and Kaites, the operator may have a private cause of action against third parties, but that does not affect the operator's liability under Section 315(a).

For the reasons stated above, it is obvious that DER's motion for summary judgment as to Ingram Partnership must be granted, and Ingram Partnership's motion for summary judgment must be denied.

2. Liability of Herman J. Israel for the Discharges.

(a) Israel's Motion to Dismiss

First, we must address Israel's motion to dismiss. The sole basis for this motion was that Herman J. Israel died after the Compliance Order was issued. DER filed a response to this motion, contending that Mr. Israel's liability survives him and is transferred by operation of law to his estate. See 20 Pa. C.S. § 3371, 42 Pa. C.S. § 8302. DER asserted that the personal representatives of Mr. Israel's estate -- Herman L. Israel and Betty Ann

Taylor -- should be substituted for Mr. Israel.

DER is correct that Israel's liability survives him. See 20 Pa. C.S. § 3371, 42 C.S. § 8302. In addition, we may substitute the personal representatives of Israel's estate for Israel. See 20 Pa C.S. § 3372. Therefore, we will deny Israel's motion to dismiss, and grant DER's request to substitute Herman L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel, for Israel.

(b) DER's Motion for Summary Judgment against Israel.

DER's motion seeks summary judgment against Herman J. Israel because he was an "operator" on the site. Although, as stated in the previous section, Israel never became the permit holder on the site, DER asserts that Israel conducted remedial

work and carried on a water monitoring program while he was the owner of Ingram Coal Co. Thus, DER contends that Israel became an "operator" under Section 3 of the Surface Mining Conservation and Reclamation Act (SMCRA), 52 P.S. § 1396.3, and that his activities constituted "operation of a mine" under Section 315(a) of the CSL, 35 P.S. § 691.315(a). As a result, DER argues that Israel can be held liable under Section 315(a) for the discharges from the site, whether he caused them or not.

Israel argues that he cannot be held responsible under Section 315(a) because he never became the permittee for the site, citing Morcoal v. Commonwealth, DER, 74 Pa. Commonwealth Ct. 108, 459 A.2d 1303 (1983). Israel also argues that his reclamation and water monitoring activities do not constitute "operation of a mine" because if they do, then a multitude of parties who were always viewed as independent

contractors would be engaged in "operation of a mine." Indeed, Israel contends that, under DER's construction of the term, DER itself engages in "operation of a mine" since DER conducts water sampling on mining sites. Finally, Israel contends that his actions did not contribute to or affect the discharges.

We agree with DER that Israel is responsible under Section 315(a) due to his activities which constitute "operation of a mine."[20] We recognize that this case presents an unusual situation in that Israel did not have a permit to mine the site, but responsibility under Section 315(a) is not based upon a permit, it is based upon operation of a mine. Israel cannot escape liability simply because he

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[20] Section 315(a) defines operation of a mine to include, among other things, "any . . . . work done on land or water in connection with the mine." Certainly, Israel's reclamation and water sampling come within this definition.

failed to secure a permit and, thus, operated illegally. With regard to Israel's argument that DER's interpretation of "operation of a mine" will subject independent contractors, and possibly DER itself, to liability under Section 315(a), this is not the case because DER has restricted its definition to those who are "operators" -- principals rather than agents -- under SMRCA. See 52 P.S. § 1396.3.

In addition, we disagree with Israel that liability is restricted to the permittee under Morcoal v. Commonwealth, DER, 74 Pa. Commonwealth Ct. 108, 459 A.2d 1303 (1983). In Morcoal, the Court rejected a permittee's attempt to deflect responsibility to a third party who the permittee claimed was the actual operator of the site. This does not mean, however, that DER is precluded from assigning responsibility to an operator simply

because he acted illegally and operated without a permit. In such a case, both the permittee and the de facto operator are subject to liability.

In summary, we will deny Israel's motion to dismiss, and grant DER's request to substitute the personal representatives of Israel's estate. In addition, Israel is responsible for the discharges under Section 315(a) regardless of whether he caused them or not. Therefore, we will also grant DER's motion for summary judgment against Israel.

3. Liability of Rockwood Energy and Mineral Corporation for the Discharges.

The final issue involves Rockwood's motion for summary judgment. DER did not file a motion for summary judgment against Rockwood because it believes that

Rockwood's liability depends on unresolved questions of fact.

Rockwood argues that it is not responsible for the discharges because it did not conduct mining, reclamation, or any other surface mining activities at the site, and because it is not the permittee for the site. Rockwood further contends that it cannot be held responsible merely because of its contractual relationship with Israel. Finally, Rockwood argues it cannot be held liable as a successor to the Ingram Partnership.

In its response to Rockwood's motion, DER contends that it believes Rockwood conducted the final round of water sampling and made the decision to discontinue the water monitoring program. If so, Rockwood engaged in "operation of a mine," and is subject to Section 315. However, the Department recognizes that these facts were not conclusively established at the

supersedeas hearing; therefore, a hearing is necessary to address Rockwood's liability. Furthermore, DER asserts that whether Rockwood can be held responsible as a successor to Ingram Coal Co. hinges upon factual questions regarding what assets and liabilities of Ingram Coal Co. have been assumed by Rockwood.

It follows from what we stated above with regard to Israel that Rockwood engaged in "operation of a mine" if it authorized the water sampling on the site. We agree with DER that a hearing is necessary to address whether Rockwood did authorize the water sampling; therefore, we will deny Rockwood's motion for summary judgment.[21]

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[21] We take no position on the arguments of the parties regarding successor liability.

Order

AND NOW, this 17th day of April, 1990, it is ordered that:

1) Herman J. Israel's motion to dismiss is denied, and DER's request to substitute Herman L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel, is granted.

2) DER's motion for partial summary judgment is granted, and summary judgment is entered against Appellants Clark R. Ingram, George M. Ingram, Gary C. Ingram, and Gregory B. Ingram (the Ingram Partnership), and also against Herman L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel.

3) The cross-motions for summary judgment filed by the Ingram Partnership and Rockwood Energy and Mineral Corporation are denied.

4) The appeals filed by the Ingram Partnership at EHB Docket No. 88-394-R and by Israel at EHB Docket No. 88-395-R are dismissed.

ENVIRONMENTAL HEARING BOARD

/s/ Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

/s/ Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

/s/ Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

/s/ Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

/s/ Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 27, 1990

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

INGRAM COAL COMPANY, et al.	)	
v.	)	EHB Docket No. 88-291-F (Consolidated Cases)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	)	

ORDER

AND NOW, this 27th day of April, 1990, upon consideration of the Department's Motion to correct opinion and order, which correctly points out that the Board committed a typographical error at four different places in its opinion and order of April 27, 1990, by identifying "Herman L. Israel" as one of the personal representatives of Herman J. Israel's estate, when in fact the correct name of this individual is "Henry L. Israel," it

is ordered that the Board's Opinion and Order issued on April 17, 1990 is amended to substitute "Henry L. Israel" for "Herman L. Israel" at the following places:

1) Opinion, page 12, section 2(a), first paragraph.

2) Opinion, page 12, section 2(a), second paragraph.

3) Order, page 16, paragraph no. 1.

4) Order, page 16, paragraph no. 2.

ENVIRONMENTAL HEARING BOARD

/s/ Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

/s/ Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

/s/ Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

/s/ Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

/s/ Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 27, 1990

APPENDIX D

UNITED STATES CONSTITUTIONAL PROVISIONS

TEXT OF UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

PENNSYLVANIA STATUTORY PROVISIONS

TEXT OF SECTION 315(a) OF THE PENNSYLVANIA CLEAN STREAMS LAW, 35 P.S. §691.315(a)

§ 691.315. Operation of Mines

(a) No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department. Operation of the mine shall include preparatory work in connection with the opening or reopening of a mine, refuse disposal, backfilling, sealing, and other closing procedures, and any other work done on land or water in connection with the mine. A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act

of August 23, 1965 (P.L. 372, No. 194). The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the department, is hereby declared to be a nuisance. Whenever a permit is requested to be issued pursuant to this subsection, and such permit is requested for permission to operate any mining operations, the city, borough, incorporated town or township in which the operation is to be conducted shall be notified by registered mail of the request, at least ten days before the issuance of the permit or before a hearing on the issuance, whichever is first.

TEXT OF SECTION 602(c) OF THE PENNSYLVANIA CLEAN STREAMS LAW, 35 P.S. §691.602(c)

§ 691.602. Penalties

(c) Any person or municipality who, after a conviction of a misdemeanor for any violation within two years as above provided, wilfully or negligently violates any provision of this act, any rule or regulation of the department, any order of the department, or any condition of any permit issued pursuant to this act is guilty of a misdemeanor of the second degree and, upon conviction, shall be subject to a fine of not less than two thousand five hundred dollars ($2,500) nor more than fifty thousand dollars ($50,000) for each separate offense or to imprisonment for a period of not more than two years, or both.

TEXT OF SECTION 605(a) OF THE PENNSYLVANIA CLEAN STREAMS LAW, 35 P.A. §691.605(a)

§ 691.605. Civil penalties generally

(a) In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand Dollars ($10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the wilfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors. It shall be payable to the Commonwealth of Pennsylvania and shall be collectible in any manner provided at law for the collection of debts. If any person liable to pay any such penalty neglects or refuses to pay the same after demand, the amount, together with interest and any costs that may accrue,

shall constitute a judgment in favor of the Commonwealth upon the property of such person from the date it has been entered and docketed of record by the prothonotary of the county where such is situated. The department may, at any time, transmit to the prothonotaries of the respective counties certified copies of all such judgments, and it shall be the duty of each prothonotary to enter and docket them of record in his office, and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof.

APPENDIX F

PENNSYLVANIA REGULATORY PROVISIONS

TEXT OF SECTION 77.92(26) OF REGULATIONS OF PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD, 25 PA. CODE §77.92(26)

Subchapter D. Requirements Accompanying Permits Authorizing the Operation of Surface Coal Mines

* * *

§ 77.92. Requirements.

* * *

III. Water Quality Criteria.

* * *

26. The operator shall take the necessary steps to eliminate, if possible, any gravity drains from previous mining. Any drainage so encountered shall be treated to neutrality during the period of corrective action and during the life of the operation. The operator shall be responsible for any additional pollution load.

TEXT OF SECTION 77.92(d)(8) OF REGULATIONS OF PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD, 25 PA. CODE §77.92(d)(8)

Subchapter D. Requirements Accompanying Permits Authorizing the Operation of Surface Coal Mines

* * *

§ 77.92. Requirements.

* * *

(d) Drainage. The following drainage standards shall apply:

* * *

(8) The operator shall take the necessary steps to eliminate, if possible, any gravity drains from previous mining. Any drainage so encountered shall be treated to neutrality during the period of corrective action and during the life of the operation. The operator shall be responsible for any additional pollution load.

TEXT OF SECTION 87.102(a)(1), (2) AND (5) OF REGULATIONS OF PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD, 25 PA. CODE §87.102(a)(1), (2) AND (5)

Subchapter E. SURFACE COAL MINES: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

* * *

§ 87.102. Hydrologic balance: effluent standards.

(a) At a minimum, the discharge of water from areas disturbed by mining activities, including area disturbed by mineral preparation, processing, or handling facilities, shall comply with the following discharge limitation:

(1) Acid. There shall be no discharge of water which is acid.

(2) Iron. There shall be no discharge of water containing a concentration of iron in excess of seven milligrams per liter.

* * *

(5) pH. The pH of discharges of water shall be maintained between 6.0 and 9.0, except in the following circumstances:

(i) When the discharger can show the water is discharged to an acid stream, in which cases the pH may be greater than 9.0; or

(ii) The discharger affirmatively demonstrates, in writing, to the Department that biological respiration in the wastewater treatment system will cause the discharge to exceed the limits set forth in this section and that exceeding these limits will not result in a violation of applicable water quality standards in Chapter 93 (relating to water quality standards) or of the applicable treatment requirements and effluent limitations to which a discharge is subject under the Federal Water Pollution Control Act, known as the Clean Water Act, in which case the Department may grant a variance in writing from the limitation set forth in this section; or

(iii) When the discharger affirmatively demonstrates to the Department that the wastewater treatment process being used by the discharger requires the pH to be raised

above 9.0, that the elevated pH will not cause a safety hazard at the outfall, and that the elevated pH will not result in a violation of applicable water quality standards in Chapter 93 (relating to water quality standards) or of the applicable treatment requirements and effluent limitations to which a discharge is subject under the Clean Water Act, the Department may grant a variance from this limitation.

APPENDIX G

RAISING OF FEDERAL QUESTION BEFORE SUPREME COURT OF PENNSYLVANIA

EXCERPTS FROM PETITION FOR ALLOWANCE OF APPEAL ON BEHALF OF CLARK R. INGRAM, GEORGE M. INGRAM, GARY C. INGRAM AND GREGORY B. INGRAM

* * *

QUESTIONS PRESENTED FOR REVIEW

* * *

II. WHETHER IMPOSITION OF STRICT LIABILITY UPON A FORMER SURFACE MINE OPERATOR UNDER SECTION 315(a) OF THE CLEAN STREAMS LAW FOR DISCHARGES FROM A MINING SITE SOME SIX YEARS AFTER COMPLETION OF MINING ACTIVITIES, REGARDLESS OF ANY FINDING THAT THE FORMER OPERATOR CAUSED OR ADVERSELY AFFECTED THE DISCHARGES, AND IN VIOLATION OF OFFICIAL DER REGULATIONS IN EFFECT DURING THE COURSE OF ITS MINING

ACTIVITIES, CONSTITUTES A VIOLATION OF THE GUARANTEE OF DUE PROCESS OF LAW PROVIDED UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS?

(Answered in the negative below).

* * *

II. IMPOSITION OF STRICT LIABILITY UPON A FORMER SURFACE MINE OPERATOR UNDER SECTION 315(a) OF THE CLEAN STREAMS LAW FOR DISCHARGES FROM A MINING SITE SOME SIX YEARS AFTER COMPLETION OF MINING ACTIVITIES, REGARDLESS OF ANY FINDING THAT THE FORMER OPERATOR CAUSED OR ADVERSELY AFFECTED THE DISCHARGES, AND IN VIOLATION OF OFFICIAL DER REGULATIONS IN EFFECT DURING THE COURSE OF ITS MINING ACTIVITIES, CONSTITUTES A VIOLATION OF THE GUARANTEE OF DUE PROCESS OF LAW PROVIDED UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS.

A. Imposition of Strict Liability, Without Causation on Ingrams is Fundamentally Unfair and a Violation of Substantive Due Process.

In its Opinion (Appendix A), the Commonwealth Court of Pennsylvania used only two paragraphs to find that DER Regulations in effect in 1988, which establish liability without causation, could be applied to Ingrams without

violating principles of due process, even though those Regulations are contrary to the official DER Regulations which were in effect during the entire time that Ingrams conducted mining operations at the Frenchville Site and before Ingrams sold their coal mining business. (Opinion, p. 8). This holding stretches liability under Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), beyond all reasonable bounds and is an unconstitutional exercise of the Commonwealth's police power in violation of the due process protections provided by the Fourteenth Amendment to the United States Constitution and Article One, Sections One and Nine, of the Pennsylvania Constitution.

Imposition of liability, without causation, is an arbitrary exercise of DER's enforcement power. Substantive due process, moreover, is offended when DER seeks to impose liability on Ingrams in

1988 based upon new Regulations which not only were not in effect when Ingrams operated the Frenchville Site until 1982, but also which are contrary to the official DER Regulations which had been in effect at that time, which Ingrams relied upon in conducting their mining operations and which provided that there would be no liability on the part of surface mine operators with respect to pre-existing water quality problems unless the operator made the discharge worse, either in quality or quantity, by his own operations.

Although a state may exercise its police power and enact statutes and regulations to promote the public health, morals, safety and general well-being of the community, this power is not unlimited. The United States Supreme Court has long recognized that the due process clause of the Fourteenth Amendment of the United States Constitution was intended to protect

the individual from the arbitrary exercise of the powers of government. Hurtado v. California, 110 U.S. 516, 110 S. Ct. 232, 236 (1984). In Commonwealth v. Harmar Coal Co., 452 Pa. 77, 93, 306 A.2d 308 (1973), the Supreme Court of Pennsylvania set forth the following constitutional standards that apply in determining whether the state's police power was properly exercised:

> "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals." [Emphasis added].

In the present case, the imposition of liability upon Ingrams, based on a concept of strict liability without the need to show causation and contrary to official DER Regulations in effect during Ingrams' mining activities, is unduly oppressive and, therefore, unconstitutional. The

record read in a light most favorable to Ingrams establishes that there were pre-existing water quality problems at the Frenchville Site and that Ingrams did not degrade the water quality. Despite actual knowledge of apparent water quality violations during the period from 1976 to when Ingrams sold their business in 1982, DER did not issue any citations or other notices of violation to Ingrams regarding the water quality at the Site. (R. E106, E299; R. 7b-8b, 90b-95b, 116b, 127b-128b). Rather, DER acted in a manner which suggested that there was no responsibility on the part of Ingrams for the water quality by reporting that the discharges were "pre-existing," and by authorizing a Stage II Bond release and the discontinuance of quarterly water quality monitoring program. (R. 330a, 340a, 344a, 362a-363a, E299, E382-E385; R. 45b-46b, 58b-62b, 93b-94b).

These actions by DER during the time that Ingrams operated the Frenchville Site were consistent with the DER Regulations which then were in effect at 25 Pa. Code §77.92(26) as of 1972 and at 25 Pa. Code §77.92(d)(8) as of 1982, which contained a causation requirement and which imposed liability only if the surface coal mine operator made a discharge worse either in quality or quantity as a result of his own mining. (R. 140b-144b).

The Affidavit of Van G. Plocus, P.E., moreover, establishes that the mining activities of Ingrams did not make the pre-existing water quality at the Frenchville Site any worse. Rather, his investigation and field study determined that the worsening water quality problems, if any, were caused by unauthorized exploratory drilling by unknown third parties after the Frenchville Site had been reclaimed and after Ingrams sold their

business and had no further contact with the Site. (R. 515a-526a).

It is one thing to hold a surface mine operator absolutely liable for water quality problems caused during his operation of the mining site and in accordance with the applicable law in effect when the operator commenced and continued his operations. It is unduly oppressive and a violation of fundamental fairness, however, to impose strict liability, without causation, upon an operator based upon Regulations which later came into effect and which were contrary to official DER Regulations which provided the framework for liability while the mining operations occurred.

B. Imposition of Strict Liability Without Causation on Ingrams Constitutes an Unconstitutional Retroactive Application of DER Regulations.

It is an undisputed rule of statutory construction in Pennsylvania that a statute may not be construed to operate retroactively unless the legislature's intent in that regard is so clear as to preclude all question as to that intent. See Krenzelak v. Krenzelak, 503 Pa. 373, 380, 469 A.2d 987 (1983); R & P Services, Inc. v. Commonwealth, Dept. of Revenue, 116 Pa. Commw. 230, 234, 541 A.2d 432 (1988). The strong presumption against retroactivity, moreover, has been promulgated as law by Pennsylvania's legislature:

> "No statute shall [be] construed to be retroactive unless clearly and manifestly so intended by the General Assembly."

1 Pa.C.S.A. §1926. This principle is fully applicable to the regulations of administrative agencies. R & P Services, Inc. v. Commonwealth, Dept. of Revenue, 116 Pa. Commw. 230, 234, 541 A.2d 432 (1988); Klesh v. Commonwealth, Dept. of Public Welfare, 55 Pa. Commw. 587, 590-591, 423 A.2d 1348 (1980).

Even if legislative intent for retroactive operation of a statute is present, however, Pennsylvania's courts have nonetheless placed significant limitations on such retroactivity. For instance, when the retroactive effect of a law would alter the substantive rights of a party, the statute cannot be construed to be retroactive, because:

> "[W]hen substantive rights are involved, the applicable law must be that which is in effect at the time the cause of action arises."

Bell v. Koppers Co., Inc., 481 Pa. 454, 458, 392 A.2d 1380 (1978); Brown v.

Commonwealth, State Bd. of Pharmacy, 129 Pa. Commw. 642, 648, 566 A.2d 913 (1989); Bortulin v. Harley-Davidson Motor Co., Inc., 115 Pa. Commw. 42, 47, 539 A.2d 906 (1988).

Substantive rights which cannot be affected by retroactive legislation are essentially those rights which rise above mere procedural rights. For example, in Costa v. Lair, 241 Pa. Super. 517, 520, 363 A.2d 1313 (1976), the right affected by the retroactive application of the statute at issue was held to be substantive because:

> "[I]f applied retroactively, the Act would create legal liability for damages which did not exist at the time the accident occurred."

Furthermore, statutes or regulations may not be given retroactive application if to do so would violate those principles of due process of law set forth in the United States or Pennsylvania Constitutions. Krenzelak v. Krenzelak, 503 Pa. 373, 380,

469 A.2d 987 (1983); R & P Services, Inc. v. Commonwealth, Dept. of Revenue, 116 Pa. Commw. 230, 235, 541 A.2d 432 (1988). Retroactive application of laws offends the due process clause if, upon balancing the interests of both parties, such application would be unreasonable. Krenzelak v. Krenzelak, 503 Pa. 373, 382, 469 A.2d 987 (1983).

Application of the above principles to the present case reveals conclusively that DER should not be able to now hold the Ingrams liable for actions which, when they were taken, were clearly permitted by DER's own official Regulations. Ingrams mined the Frenchville site from 1976 to 1982. On May 28, 1982, Ingrams sold their entire coal stripping business and ceased all involvement in the strip mining of coal. (R. E277-E286; R. 48b, 57b, 118b). At the time Ingrams sold the business, there were

no outstanding DER violations. (R. 297a; R. 7b, 10b, 116b-117b, 128b-129b).

During the entire time Ingrams engaged in mining activities at the Frenchville Site, from 1976 to May of 1982, Ingrams operated under the following DER Regulation:

> "The operator shall take the necessary steps to eliminate, if possible, any gravity drains from previous mining. Any drainage so encountered shall be treated to neutrality during the period of corrective action and during the life of the operation. The operator shall be responsible for any additional pollution load." [Emphasis added].

25 Pa. Code §77.92(26) (1972), later codified at 25 Pa. Code §77.92(d)(8)(1982).

J. Anthony Ercole, who was the Director of the DER's Bureau of Surface Mining Reclamation from 1977 to 1983, testified by Affidavit that he was intimately familiar with the DER's surface mining rules and regulations and the DER's official practices and procedures. (R.

140b-144b). Ercole further stated that the above-cited Regulation accurately reflects the DER's policy during his tenure:

> "This Regulation at 25 Pa. Code Section 77.92 embodied the official policy and practice of the Department of Environmental Resources not to hold surface coal mine operators responsible for mine discharges existing from prior mining, after the life of the operator's mining, whether the discharges were on or off the operator's permit area, unless the operator made the discharge worse either in quality or quantity as a result of his own mining." [Emphasis added].

(R. 140b-144b).

This DER Regulation clearly required the element of causation by a surface mine operator who came into contact with pre-existing discharges. DER's attempt to now ignore the provisions of that Regulation and hold Ingrams responsible for the pre-existing discharges pursuant to current Regulations which do not address causation constitutes an impermissible retroactive application of the current DER

Regulations in violation of due process of law.

As noted above, retroactive application of a law violates principles of due process if to so apply the law would be "unreasonable." Krenzelak v. Krenzelak, 503 Pa. 373, 380, 469 A.2d 987 (1983). One of the recognized definitions of an unreasonable effect of a retroactive law is when the law varies existing obligations contrary to the situation when entered. 503 Pa. at 383. Retroactive application of the subject Regulations clearly varies the obligations Ingrams had when they conducted their mining operation, and such application is thus unreasonable.

In summary, retroactive application of the current DER Regulations operates to hold Ingrams liable for discharges for which they were specifically held not to be liable under official DER Regulations in effect at the time of Ingrams' mining

operation. If Ingrams did not cause the pre-existing water quality problems which provide the basis for the Compliance Order, and would not have been liable under DER Regulations in effect while they operated the Frenchville Site, the Commonwealth cannot belatedly amend the DER Regulations, after Ingrams ceased operation of the site, to impose liability merely because the pre-existing condition is continuous and ongoing. This Honorable Court should agree to hear Ingrams' appeal in order to prevent the violation of significant constitutional rights.

APPENDIX H

RAISING OF FEDERAL QUESTION BEFORE COMMONWEALTH COURT OF PENNSYLVANIA

EXCERPTS FROM BRIEF FOR PETITIONERS CLARK R. INGRAM, GEORGE M. INGRAM, GARY C. INGRAM AND GREGORY B. INGRAM AT NO. 1075 C.D. 1990

* * *

STATEMENT OF QUESTIONS INVOLVED

* * *

II. Whether the effort by DER to impose strict liability upon a surface mine operator, regardless of any finding that the operator caused or adversely affected the discharges, is unconstitutional?

(Negatived by the government unit below)

* * *

II. THE EFFORT BY DER TO IMPOSE STRICT LIABILITY UPON A SURFACE MINE OPERATOR, REGARDLESS OF ANY FINDING THAT THE OPERATOR CAUSED OR ADVERSELY AFFECTED THE DISCHARGES, IS UNCONSTITUTIONAL.

In issuing the Compliance Order, DER seeks to impose strict liability upon Ingrams for the water quality problems at the Frenchville Site without any finding that Ingrams caused or adversely affected the discharges. DER also seeks to ignore its own official policy and practice, set forth in codified DER Regulations which were in effect at the time that Ingrams operated the Site and which provided that a surface coal mine operator was not responsible for pre-existing water quality problems unless the operator has made the discharge worse, either in quality or quantity by his own operations. These efforts constitute an improper exercise of

DER's police power and are an impermissible violation of Ingrams' constitutional rights.

(A) Application of Principles of Strict Liability Without Causation to Ingrams Under Section 315(a) of the Clean Streams Law is Unconstitutional.

In the Opinion and Order Sur Motion for Partial Summary Judgment, Cross-Motions for Summary Judgment, and Motion to Dismiss dated April 17, 1990, the Environmental Hearing Board held that an operator is legally responsible for any discharges emanating from its mining site, regardless of whether the operator caused or contributed to the discharge. (R. 608a). This holding stretches liability under Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), beyond all reasonable bounds and is an unconstitutional exercise of the Commonwealth's police power.

In issuing this extreme ruling, the Environmental Hearing Board acted despite its recognition of two important concerns. First, no Pennsylvania appellate court has ever held that an operator can be liable under Section 315(a) where the operator did not cause the discharge.[22] (R. 608a). Causation by the operator was present in the cases of Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977), Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973), and William J. McIntire Coal Co. v. Commonwealth, Dept. of Environmental Resources, 108 Pa. Commw. 443, 530 A.2d 140 (1987).

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[22] Subsequent to service of the advance text of their Brief pursuant to Pa.R.A.P. 2187(b), Ingrams became aware of the decision in Thompson & Phillips Coal Co. v. Commonwealth, Dept. of Environmental Resources, ____ Pa. Commw. _____, 582 A.2d 1162 (1990), which presently is the subject of a Petition for Allowance of Appeal at No. 691 WD Allocatur Docket 1990.

Second, imposition of strict liability without causation is a departure from traditional concepts of liability under tort law. (R. 609a). Not only does the Board impose liability upon Ingrams without fault, as in a typical "strict liability" case, but also the Board goes one step further and imposes strict liability without causation by the operator.

The unreasonableness of holding a mine operator liable for pollution absent any proof of causation is highlighted by the fact that Pennsylvania has not adopted those tort theories which hold a defendant liable without the element of causation, despite a trend towards such liability in some areas of the law. See Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 287, 505 A.2d 973 (1985) (holding that Pennsylvania has not adopted the market share alternate liability theory of recovery for product liability cases). In

Pennsylvania, extension of liability without fault "has not been in disregard of fundamentals pertaining to the tort law of causation." Bascelli v. Randy, Inc., 339 Pa. Super. 254, 259, 488 A.2d 1110 (1985); Oehler v. Davis, 223 Pa. Super 333, 334, 298 A.2d 895 (1972).

Although a state may exercise its police power and enact statutes and regulations to promote the public health, morals, safety and general well-being of the community, this power is not unlimited. In Commonwealth v. Harmar Coal Co., 452 Pa. 77, 93, 306 A.2d 308 (1973), the Supreme Court of Pennsylvania set forth the following constitutional standards that apply in determining whether the state's police power was properly exercised:

> "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public require such interference; and, second, that the means are reasonably

necessary for the accomplishment of the purpose and not unduly oppressive upon individuals." [Emphasis added].

In the present case, the imposition of liability upon Ingrams, based on a concept of strict liability without the need to show causation, is unduly oppressive and, therefore, unconstitutional. The record read in a light most favorable to Ingrams establishes that there were pre-existing water quality problems at the Frenchville Site and that Ingrams did not degrade the water quality. Despite actual knowledge of apparent water quality violations during the period from 1976 to 1982 when Ingrams sold their business, DER did not issue any citations or other notice of violations to Ingrams regarding the water quality at the Site. (R. E106, E299; R. 7b-8b, 90b-95b, 116b, 127b-128b). Rather, DER acted in a manner which suggested that there was no responsibility on the part of Ingrams for

the water quality by reporting that the discharges were "pre-existing," and by authorizing a Stage II Bond release and the discontinuance of quarterly water quality monitoring program. (R. 330a, 340a, 344a, 362a-363a, E299, E382-E385; R. 45b-46b, 58b-62b, 93b-94b).

These actions by DER during the time that Ingrams operated the Frenchville Site were consistent with the DER Regulations which then were in effect at 25 Pa. Code §77.92(26) as of 1972 and at 25 Pa. Code §77.92(d)(8) as of 1982 and which contained a causation requirement and imposed liability only if the surface coal mine operator made a discharge worse either in quality or quantity as a result of his own mining. (R. 140b-144b).

The Affidavit of Van G. Plocus, P.E., moreover, establishes that the mining action of Ingrams did not make the pre-existing water quality at the

Frenchville Site any worse. Rather, his investigation and field study determined that the worsening water quality problems, if any, were caused by unauthorized exploratory drilling by unknown third parties after the Frenchville Site had been reclaimed and after Ingrams sold their business and had no further contact with the Site. (R. 515a-526a).

The Environmental Hearing Board has held Ingrams legally responsible for the water quality problems at the Frenchville Site without any showing that Ingrams caused the pollution. This unprecedented departure from concepts of fundamental fairness is unduly oppressive to Ingrams and is an unconstitutional exercise of the State's police power.

(B) Imposition of Strict Liability Without Causation on Ingrams Constitutes an Unconstitutional Retroactive Application of DER Regulations.

The effort to impose strict liability without causation upon Ingrams is even more egregious when the actions of DER during the period that Ingrams operated the Frenchville Site are considered. Prior to the sale of their business on May 28, 1982, Ingrams operated under former DER Regulations which required a showing that the surface coal mining operator caused a degradation of any pre-existing discharge. The Compliance Order, however, is based on current DER Regulations which do not address causation and, therefore, constitutes an unconstitutional retroactive application of those Regulations to Ingrams.

It is an undisputed rule of statutory construction in Pennsylvania that a statute may not be construed to operate retroactively unless the legislature's intent in that regard is so clear as to preclude all question as to that intent. See Krenzelak v. Krenzelak, 503 Pa. 373, 380, 469 A.2d 987 (1983); R & P Services, Inc. v. Commonwealth, Dept. of Revenue, 116 Pa. Commw. 230, 234, 541 A.2d 432 (1988). Under this rule, when the language of a statute is general and may be given both prospective and retroactive operation, it must be held to be prospective only. Krenzelak v. Krenzelak, 503 Pa. 373, 380, 469 A.2d 987 (1983).

The strong presumption against retroactivity, moreover, has been promulgated as law by Pennsylvania's legislature:

> "No statute shall [be] construed to be retroactive unless clearly

and manifestly so intended by the General Assembly."

1 Pa.C.S.A. §1926. This principle is fully applicable to the regulations of administrative agencies. R & P Services, Inc. v. Commonwealth, Dept., 116 Pa. Commw. 230, 234, 541 A.2d 432 (1988); Klesh v. Commonwealth, Dept. of Public Welfare, 55 Pa. Commw. 587, 590-591, 423 A.2d 1348 (1980).

In R & P Services, Inc. v. Commonwealth, Dept. of Revenue, 116 Pa. Commw. 230, 235, 541 A.2d 432 (1988), the Commonwealth Court described retroactive application as follows:

> "A retroactive law has been defined as one which relates back to and gives a previous transaction a legal effect different from that which it had under the law in effect when it transpired . . .. A law is given retroactive effect when it is used to impose new legal burdens on a past transaction or occurrence. [Citations omitted]."

Several Pennsylvania appellate courts have considered statutes or regulations which operate retroactively despite the absence of specific legislative intent for such retroactivity. In those cases, the courts have held the retroactive operation impermissible. For instance, in Commonwealth, Bureau of Employment Security v. Pennsylvania Engineering Corp., 54 Pa. Commw. 376, 379, 421 A.2d 521 (1980), the plaintiff sought to enforce a statute requiring the defendant to contribute money to the state's Unemployment Compensation Fund, although the event triggering the requirement for contribution occurred prior to enactment of the statute. The Court, however, found that there existed no clear legislative intent that the statute be retroactive and, therefore, the plaintiff could not rely on the statute to compel the defendant to contribute to the Fund. 54 Pa. Commw. at 380-381.

The Court did not consider the constitutionality or even appropriateness of applying the statute retroactively. The court clearly based its decision solely on the fact that the plaintiff was attempting retroactive operation of a statute in which there was no clear legislative intent for retroactivity. 54 Pa. Commw. at 381. See also Costa v. Lair, 241 Pa. Super. 517, 363 A.2d 1313 (1976); Green v. Pennsylvania Public Utility Commission, 81 Pa. Commw. 55, 473 A.2d 209 (1984) (both finding statutes not retroactive absent evidence of specific legislative intent for retroactivity).

Even if legislative intent for retroactive operation of a statute is present, Pennsylvania's courts still have placed significant limitations on such retroactivity. For instance, when the retroactive effect of a law would alter the substantive rights of a party, the statute

cannot be construed to be retroactive, because:

> "[W]hen substantive rights are involved, the applicable law must be that which is in effect at the time the cause of action arises."

Bell v. Koppers Co., Inc., 481 Pa. 454, 458, 392 A.2d 1380 (1978); Brown v. Commonwealth, State Bd. of Pharmacy, 129 Pa. Commw. 642, 648, 566 A.2d 913 (1989); Bortulin v. Harley-Davidson Motor Co., Inc., 115 Pa. Commw. 42, 47, 539 A.2d 906 (1988).

Substantive rights which cannot be affected by retroactive legislation are essentially those rights which rise above mere procedural rights. For example, in Costa v. Lair, 241 Pa. Super. 517, 520, 363 A.2d 1313 (1976), the right affected by the retroactive application of the statute at issue was held to be substantive because:

> "[I]f applied retroactively, the Act would create legal liability for damages which did not exist

at the time the accident occurred."

Furthermore, statutes or regulations may not be given retroactive application if to do so would violate those principles of due process of law set forth in the United States or Pennsylvania Constitutions. Krenzelak v. Krenzelak, 503 Pa. 373, 380, 469 A.2d 987 (1983); R & P Services, Inc. v. Commonwealth, Dept. of Revenue, 116 Pa. Commw. 230, 235, 541 A.2d 432 (1988); 116 Pa. Commw. at 235. Retroactive application of laws offend the due process clause if, upon balancing the interests of both parties, such application would be unreasonable. Krenzelak v. Krenzelak, 503 Pa. 373, 382, 469 A.2d 987 (1983).

Application of the above principles to the present case reveals conclusively that DER should not be able to now hold the Ingrams liable for actions which, when they were taken, were clearly permitted by DER's

own regulations and official policy and procedure.

Ingrams mined the Frenchville site from 1976 to 1982. On May 28, 1982, Ingrams sold their entire coal stripping business and ceased all involvement in the strip mining of coal. (R. E277-E286; R. 48b, 57b, 118b). At the time Ingrams sold the business, there were no outstanding DER violations. (R. 297a; R. 7b, 10b, 116b-117b, 128b-129b).

During the entire time Ingrams engaged in mining activities at the Frenchville Site, from 1976 to May of 1982, Ingrams operated under the following DER Regulation:

> "The operator shall take the necessary steps to eliminate, if possible, any gravity drains from previous mining. Any drainage so encountered shall be treated to neutrality during the period of corrective action and during the life of the operation. <u>The operator shall be responsible for any additional pollution load</u>." [Emphasis added].

25 Pa. Code §77.92(26) (1972), later codified at 25 Pa. Code §77.92(d)(8)(1982).

J. Anthony Ercole, who was the Director of the DER's Bureau of Surface Mining Reclamation from 1977 to 1983, testified by Affidavit that he was intimately familiar with the DER's surface mining rules and regulations and the DER's official practices and procedures. (R. 140b-144b). Ercole further stated that the above-cited Regulation accurately reflects the DER's policy during his tenure:

> "This Regulation at 25 Pa. Code Section 77.92 embodied the official policy and practice of the Department of Environmental Resources not to hold surface coal mine operators responsible for mine discharges existing from prior mining, after the life of the operator's mining, whether the discharges were on or off the operator's permit area, unless the operator made the discharge worse either in quality or quantity as a result of his own mining."

(R. 140b-144b).

This DER Regulation and its application by the DER clearly required the element of causation by a surface mine operator who came into contact with pre-existing discharges. DER's attempt to now ignore the provisions of that Regulation and hold Ingrams responsible for the pre-existing discharges pursuant to current Regulations which do not address causation clearly is an impermissible retroactive application of the current DER Regulations.

DER's Compliance Order cites Ingrams for violations of effluent limitations set forth at 25 Pa. Code §§87.102(a)(1), (2) and (5). Nowhere in these Regulations, or anywhere else in the Pennsylvania Code or Pennsylvania Bulletin, is there any evidence of legislative intent to make these Regulations retroactive. Nor is there evidence in any of the several statutes which DER cites as support for its

Compliance Order of legislative intent to apply the standards of 25 Pa. Code §§87.102(a)(1), (2) or (5) retroactively. Since Pennsylvania law, as outlined above, does not permit retroactive application of an administrative regulation without clear evidence of legislative intent to do so, DER may not retroactively apply these Regulations to Ingrams.

Even if it were somehow to be determined that there was a legislative intent to apply the Regulations at issue retroactively, such application would be contrary to those principles of Pennsylvania law. As noted above, a law is not permissibly retroactive if it affects a substantive right, that is, if it creates legal liability for damages which did not exist at the time of the occurrence. Costa v. Lair, 241 Pa. Super. 517, 363 A.2d 1313 (1976). In the present case, the evidence is overwhelming that the Regulations in

effect during the period of Ingrams mining, as well as DER's interpretation and enforcement of those Regulations, created no legal liability in Ingrams for their mining activities at the time of those activities. Now DER is attempting to retroactively apply current Regulations to create legal liability where none before existed. Thus DER's retroactive application of the Regulations are adversely affecting Ingrams substantive rights and may not be allowed.

Furthermore, DER's retroactive application of these regulations would violate Ingrams constitutional rights to due process of law. As noted above, retroactive application of a law violates principles of due process if to so apply the law would be "unreasonable." Krenzelak v. Krenzelak, 503 Pa. 373, 380, 469 A.2d 987 (1983). One of the recognized definitions of an unreasonable effect of a

retroactive law is when the law varies existing obligations contrary to the situation when entered. 503 Pa. at 383. Retroactive application of the subject Regulations clearly varies the obligations Ingrams had when they conducted their mining operation, and such application is thus unreasonable.

In sum, retroactive application of the current DER Regulations operates to hold Ingrams liable for discharges for which they were specifically not to be held liable for pursuant to DER Regulations in effect at the time of Ingrams operation, and for which there is insufficient proof that they played any part in causing. This is clearly an unreasonable result caused by retroactive application of current DER Regulations and, thus, violates the due process clauses of the Pennsylvania and United States Constitutions. Therefore,

retroactive application of current DER Regulations must not be permitted.

EXCERPTS FROM REPLY BRIEF FOR PETITIONERS CLARK R. INGRAM, GEORGE M. INGRAM, GARY C. INGRAM AND GREGORY B. INGRAM AT NO. 1075 C.D. 1990

* * *

II. THE EFFORT BY DER TO IMPOSE STRICT LIABILITY UPON A SURFACE MINE OPERATOR REGARDLESS OF ANY FINDING THAT THE OPERATOR CAUSED OR ADVERSELY AFFECTED THE DISCHARGES IS UNCONSTITUTIONAL.

DER's effort to impose strict liability upon Ingrams for the water quality problems at the Frenchville Site, without any finding the Ingrams caused or adversely affected the discharges, is an improper exercise of DER's police power and an impermissible violation of Ingrams constitutional rights.

The opinion below of the Environmental Hearing Board ("EHB") accepted DER's interpretation that Section 315(a) of the Clean Streams Law, 35 P.S. § 691.315(a), holds a mine operator strictly liable for pollution he in no way caused. (Opinion and Order Sur Motion for Partial Summary Judgment, Cross-Motions for Summary Judgment and Motion to Dismiss dated 4/17/90, (hereinafter referred to as "EHB Opinion"), p. 6). This interpretation of the statute is incorrect because it permits an unconstitutional exercise of the Commonwealth's police power by DER.

As the EHB below noted, there never has been an appellate decision holding an operator liable under Section 315(a) where the operator did not cause the discharge. (EHB Opinion, p. 6). DER cites dicta from two Pennsylvania Supreme Court decisions as support for its proposition that an operator may be held strictly liable under

Section 315(a), but regardless of DER's interpretations, they cannot stand for this proposition because causation by the operator was present in both cases -- Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 371 A.2d 401 (1977) and Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973).

DER also makes much of the language of Section 315(a) which prohibits one from "allowing" an unauthorized discharge from a mine. (Brief for Respondents, p. 31-32). DER contends that the legislature's choice of the term "allow" rather the "cause," or "contribute to," or any other language inferring causation, means that the legislature intended Section 315(a) to hold an operator strictly liable for unauthorized discharges. (Brief for Respondents, p. 32).

First, the word "allow" surely can infer an element of causation. DER's

attempt to support its extreme interpretation of Section 315(a) with an overanalysis of the word "allow," without more, is surely an insufficient basis on which to create strict liability where none existed before.

Second, DER asserts that its interpretation of Section 315(a) is deserving of great weight, and since DER wants the statute to create strict liability, this Court should interpret the statute accordingly. (Brief for Respondents, p. 32). As noted above, however, 25 Pa. Code § 77.92(26), which was in force during the entire time that Ingrams mined the Frenchville Site, held an operator responsible only for water quality problems which he caused or adversely affected. This regulation was drafted and promulgated by the Environmental Quality Board, the rule making arm of DER. See 2 Pa. Bulletin 1607-1604.

During the entire period that 25 Pa. Code § 77.92(26) was in effect, the regulation was interpreted by the entirety of DER, from its highest officials down, as meaning that an operator was not responsible for pre-existing discharges they did not worsen, despite the fact these discharges were emanating from the permitted site. (Affidavit of Ercole, ¶ 3, 7-9; Supersedeas Hearing Transcript [hereinafter referred to as "Tr."] 4). Thus, DER itself did not interpret Section 315(a) as imposing strict liability on operators while Ingrams mined the Frenchville site.

Given the foregoing, DER now is arguing that its current interpretation of Section 315(a) must be given effect, while its interpretation of the statute during the time Ingrams were operating the Frenchville site should be ignored. The inequity, unfairness and dubious

constitutionality of such a proposition is obvious.

As set forth in Ingrams' initial Brief, DER's attempt to now hold Ingrams liable for discharges which pre-existed their operation, when they were not held liable for such discharges during their mining operations, is an unconstitutional retroactive application of the law and administrative regulations. (Brief for Petitioner, p. 42). DER's effort to avoid this argument is based entirely on the Supreme Court's decision in Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974) ("Barnes & Tucker I"). This reliance, however, is misplaced.

Barnes & Tucker I based its decision -- that the Commonwealth's attempt to apply the Clean Streams Law to conduct which predated that new law was not retrospective legislation -- on the following maxim:

> "Legislative withdrawal of a prior grant of privilege is not retrospective legislation."

455 Pa. at 417. This rule is inapplicable to the present case, however, because Ingrams never had a "privilege" to pollute; they merely had the right to not to be held liable for pollution caused by others.

As described in detail above, the Commonwealth has never had the statutory authority to require a mine operator to abate pollutive discharges which he in no way caused or adversely affected. Thus, it has never been a "privilege" for Ingrams not to be held liable for pollution caused by others. DER's present attempt to hold Ingrams liable for such pollution is not a withdrawal of a prior grant of a privilege, but rather is an unconstitutional retrospective application of administrative regulations.

* * *

APPENDIX I

RAISING OF FEDERAL QUESTION BEFORE PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

EXCERPT FROM OBJECTIONS TO DER MOTION FOR PARTIAL SUMMARY JUDGMENT OR IN THE ALTERNATIVE TO LIMIT ISSUES, AND CROSS-MOTION FOR SUMMARY JUDGMENT ON BEHALF OF APPELLANTS CLARK R. INGRAM, GARY C. INGRAM, GEORGE M. INGRAM AND GREGORY B. INGRAM

* * *

62. Compliance Order No. 88H057, as amended and restated, issued against appellants Remcorp, Israel and the Ingram Family Partnership is based upon the contention by appellee DER that the water quality of the discharges is in violation of current regulatory standards. This attempt to hold the Ingram Family Partnership liable under new standards, more than six years after Ingram Family

Partnership sold its entire business and ceased all surface mining activities, constitutes a violation of fundamental fairness and due process of law. John G. Bintner, 1973 EHB 252, 254-255 (1973); U.S. Constitution, Amendment IV[XIV], Section 1.

EXCERPTS FROM BRIEF IN SUPPORT OF OPPOSITION TO THE DER MOTION FOR PARTIAL SUMMARY JUDGMENT OR IN THE ALTERNATIVE TO LIMIT ISSUES AND CROSS-MOTION FOR SUMMARY JUDGMENT ON BEHALF OF APPELLANTS CLARK R. INGRAM, GARY C. INGRAM, GEORGE M. INGRAM AND GREGORY B. INGRAM

* * *

Section 315(a) of the Clean Streams Law has been the basis for the Board's and the Commonwealth Court's support of DER orders to clean up pre-existing violative discharges. See, e.g., William J. McIntire Coal Co., Inc. v. DER, 108 Pa. Commw. 443, 530 A.2d 140 (1987); Bologna Mining Co. v.

DER, EHB Docket No. 86-555-M (Opinion and Order Sur Motion for Partial Summary Judgment or in the Alternative to Limit Issues); C & K Coal Co. v. DER, 1987 EHB 786; McGal Coal Co., Inc. v. DER, 1987 EHB 771. However, Section 315(a), by its terms, does not apply to hold the Ingram Family Partnership liable for the Frenchville Site's pre-existing conditions.

Section 315(a) provides, in pertinent part:

> "No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department. A discharge from a mine shall include a discharge which occurs after mining operations have ceased . . ."

35 P.S. § 691.315(a). This section can not be applied to the Ingrams' situation because the discharges at issue were clearly authorized by the DER's rules and regulations, namely Section 77.92(26).

While the Board has recently questioned the validity of Section 77.92(26) after the Barnes and Tucker decisions, see Bologna, slip op. at 14, n. 4, the record is nonetheless clear that the regulation was in place during the entirety of the Ingrams' operation of the Frenchville Site, and that the terms of the regulation would have operated to exempt the Ingrams from cleaning up the Site. Section 77.92(26) was a conscious effort by the DER to exempt operators from liability for pre-existing discharges which were not worsened by the mining operation. Therefore, the discharges left by the Ingram Family Partnership when it ceased operating were authorized by the rules and regulations of the DER and Section 315(a), therefore, cannot be used to now compel the Ingrams to clean up the Site.

In sum, more than six years have passed since the Ingram family sold their

entire strip mining business. To attempt to hold Ingram Family Partnership to new standards, adopted by the DER after the sale, without proof that the Ingrams in some way contributed to the acid mine discharges at the Frenchville site, would constitute a violations of fundamental fairness and due process of law. John G. Bintner, 1973 EHB 252, 254-255 (1973); U.S. Constitution, Amendment IV[XIV], Section 1. Moreover, there is no appellate decisional authority in Pennsylvania for holding the Ingrams liable for cleaning up pre-existing pollutional discharges which they were not responsible for causing. The DER's Motion for Partial Summary Judgment or in the Alternative to Limit Issues should be denied, and Ingram Family Partnership's Cross-Motion for Summary Judgment should be granted.

* * *

In the present case, the DER should be estopped from requiring the Ingram Family Partnership to perform remedial work at the Frenchville Site at this late date; also the DER has waived any right to seek such compliance.

First, as noted above, during the entire time the Ingram Family Partnership operated the Frenchville Site, a specific and unambiguous DER regulation was in place which provided that a mine operator was not liable for a pre-existing condition unless it degraded the water quality by its own activity. See former Section 77.92(26) of the DER Rules and Regulations, adopted August 26, 1982 and the extensive discussion of the Regulation at Section IV-A above. This Regulation was promulgated and adopted by the rule-making arm of the DER, the Environmental Quality Board, and pronounced by the Chairman of the Environmental Quality Board, Dr. Maurice K.

Goddard. See 2 Pa. Bulletin 1607-1609. Therefore, it cannot be said that the highest officials of the Commonwealth in charge of environmental policy did not affirmatively represent that Section 77.92(26) was to be the Commonwealth's official policy and practice regarding pre-existing violative conditions.

Second, the Regulation noted above did in fact embody the official policy and practice of the DER throughout the period in which the Ingrams operated the Frenchville site, as evidenced by the Affidavit of J. Anthony Ercole, who was Director of the DER's Bureau of Surface Mining Reclamation (BSMR) from 1977 to 1983. As noted above at Section IV-A of this Brief, Mr. Ercole testifies that during the life of the Ingram Family Partnership operation, the DER simply did not hold operators liable for pre-existing discharges when those operators did nothing

to worsen the discharge. As described more fully below, this regulation, and the DER policy it articulates, was but one of several ways the DER induced the Ingram Family Partnership into justifiably believing they would not be held responsible for pre-existing water quality conditions which they did nothing to worsen.

The record reveals that the DER has known of the alleged problems of the Frenchville Site, through its own numerous inspections and laboratory reports, since 1976. The DER allowed the Ingram Family Partnership to operate, without citation for such problems, for six years at the Site, right up through the sale to Israel in May of 1982. Not only was no citation issued, but also the DER specifically identified the condition as "pre-existing" on its Inspection Reports, authorized partial bond releases and further

authorized discontinuance of a quarterly water monitoring program.

The DER correctly notes that water polluters cannot acquire a prescriptive or property right to pollute regardless of how long the DER fails to assert the statutory or common-law remedies available to stop the pollution. See Barnes & Tucker Co. v. DER, 455 Pa. 392, 416 n. 3, 319 A.2d 871 (1974) (Barnes & Tucker I); Appellee's Brief, p. 5. However, the Ingram Family Partnership estoppel argument is not based simply upon delayed enforcement, but rather affirmative enforcement of prior regulation and policy. Not only did the Ingram Family Partnership justifiably and detrimentally rely on the existence of a DER regulation which clearly exempted it from liability for the pollution now complained of, but also the actions of the DER continually reinforced the Ingrams' reliance. The facts uncovered to date reveal that the

Ingrams did not know, or have reason to know, that despite the DER's prior word and conduct to the contrary, DER would now claim the legal right to order the Ingrams to clean up the pre-existing discharges.

The DER attempts to now limit the effect of the conduct upon which the Ingrams justifiably relied. For instance, the DER asserts that the Stage II bond release and the issuance of the mine drainage permit and mining permit are not legally sufficient defenses to the Compliance Order at issue. While past individual, fact specific Board decisions may have found one DER action insufficient to estop later, apparently inconsistent actions, see, e.g., WABO Coal Co. v. DER, 1986 EHB 71 (a partial bond release held not to estop later enforcement when application for said bond release contained false information), the fact remains that each of these several actions served to

induce justifiable reliance by the Ingrams and, when taken in toto, these actions must be held to equitably estop DER's present attempt to compel the Ingrams to clean up the Frenchville Site.

The DER is now unfairly attempting to reach back in time to assert liability, for the very first time, against the Ingram Family Partnership more than six years after they sold their business on May 28, 1982 and ceased all coal mining activities. Clearly, the DER's forbearance and tolerance of the alleged problems for these many years, as well as affirmative representations of the DER's highest officials that its Department-wide policy was to not hold operators liable for pre-existing discharges which were not further degraded by mining operations, constitute sufficient "inducement" for estoppel purposes and conclusive evidence of waiver.

The Ingram Family Partnership relied to its detriment on both the affirmative representations and inaction of the DER. The Ingrams commenced mining and continued those activities based upon the actions and statements of the DER which indicated that they were not liable for water quality conditions at the Frenchville Site during the time they operate the Site. To now change the rules of the game and asset that the Ingrams are liable for conditions of which the DER had express knowledge and which the DER affirmatively approved throughout the time that the Ingrams operated the Site is fundamentally unfair and a violation of due process of law. John G. Bintner, 1973 EHB 252, 254-255 (1973); U.S. Constitution, Amendment IV, Section 1. The record is replete with factual evidence of this unfairness. Therefore, the DER's Motion for Partial Summary Judgment or in the Alternative to

Limit Issues should be denied, and Ingram Family Partnership's Cross-Motion for Summary Judgment should be granted.

Respectfully submitted,

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No. 92-328

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CLARK R. INGRAM, GEORGE M. INGRAM,
GARY C. INGRAM and GREGORY B. INGRAM,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state agency violates due process by requiring the current holder of permits for a specific mine to treat polluted water discharging from the mine so that it meets water quality criteria set in a regulation that had gone into effect six years earlier.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Commonwealth of Pennsylvania, Department of Environmental Resources, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram in this matter.

STATEMENT OF THE CASE

This case concerns three polluted discharges of acid mine drainage that flow into a stream from a surface coal mine in Clearfield County, Pennsylvania that is known as the "Frenchville" mine site.[1] Two of the discharges emerge from the ground at the "toe of spoil," the perimeter of the area that was excavated and later replaced or "backfilled" during the mining operations. The third discharge is emitted by an outlet pipe in a sediment pond constructed on the mine site. (Reproduced Record ("R.R.") 376a-377a, 406a, 407a-409a, 412a-415a, 416a, 422a-425a, 426a-427a, 428a)

In August, 1988, Respondent, the Commonwealth of Pennsylvania, Department of Environmental Resources ("Department"), issued the Petitioners and two other parties an administrative order directing them to treat the three discharges of acid mine drainage that were emanating from the Frenchville mine site. The administrative order required that the treatment of the discharges attain certain water quality standards, commonly referred to as "effluent limits," set forth in a regulation that had been promulgated in 1982 and codified at 25 Pa. Code § 87.102. *See* 12 Pa. Bull. 2382, 2473, 2517 (July 31, 1982). The administrative order was purely remedial, imposing neither criminal nor civil sanctions against any of the recipients. No criminal or civil penalty has been imposed against the Petitioners in the four years since the issuance of the administrative order.

Petitioners portray this case as one involving "pre-existing" discharges of acid mine drainage upon which their mining operations had no impact whatsoever. The evidence presented during a five-day hearing before the administrative tribunal below, the Pennsylvania Environmental Hearing Board, presents quite a different picture. Petitioner Clark R. Ingram testified that the partnership formed by him and his three sons removed between 50,000 and 100,000 tons of coal from the Frenchville surface mine. (R.R. 346a)

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[1] It is indisputable that like the village from which it derives its name, the Frenchville mine site is located in Clearfield County, not, as the Petitioners state, in Clarion County. (Petition, p. 6)

In doing so, Petitioners disturbed an area covering 27 acres. (R.R. E106) These coal removal operations took place in the "recharge area" for the three discharges at issue, that is, the surface area from which the cited discharges obtain their flow. (R.R. 459a) The Petitioners also physically affected all three of the cited discharges. They built the sediment pond that emits one of the discharges, and they attempted to seal the two "toe of spoil" discharges by burying them under mine spoil[2] and topsoil. (R.R. 347a, 378a-380a, 398a-399a)

The Petitioners' Statement of the Case does not mention that the Petitioners continue to hold the only mining permits that the Department ever has issued for the Frenchville site. When the Petitioners applied for those permits in 1976, a Department mine inspector examined the proposed mine site and its vicinity. The inspector reported finding three "spring discharges" on the site, but he did not attribute them to prior mining activity. To the contrary, the inspector wrote on his pre-mining inspection report that "[s]trip mining at this proposed operation will be in area where no previous strip mining was done," and added that he "could not find any indication of there having been deep mining in this area." (R.R. E115-E119) Later that same year, the Department issued the Petitioners two permits pertaining to the Frenchville mine site. The Petitioners' partnership is the only party that ever has been listed as the permittee on those two permits, which remain in effect today. (R.R. 285a)

The mining permits governing the Frenchville site contain a number of "special conditions." The only one of these conditions that pertains to "pre-existing" discharges provides that "[g]ravity drainages, encountered from previous mining, shall be treated to neutrality until eliminated." (R.R. E21) A separate special condition in that same permit applies specifically to sediment ponds. It requires that "[a]ny discharge from settling basins designed for siltation below

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[2] Mine spoil is part of the material that is excavated in order to reach underlying seams of coal during the surface mining process. The mine spoil, which is replaced during the backfilling of the excavated area, often contains pyrite. When exposed to oxygen and water, pyrite generates acid mine drainage.

the toe of spoil shall have a pH between 6.0 and 9.0 and an iron concentration of less than 7.0 ppm [parts per million]." (R.R. E22) Those same effluent limits have applied to all surface mine discharges since 1982 under the regulation cited in the 1988 administrative order. *See* 25 Pa. Code § 87.102(a).

Finally, the Petitioners fail to mention in their Statement of the Case that a proceeding related to this case is pending before the Supreme Court of Pennsylvania. On July 9, 1992, the Commonwealth Court of Pennsylvania enforced the 1988 administrative order by directing the Petitioners and one other party to treat the Frenchville site discharges, which have received no treatment in the four years since the issuance of the administrative order. On August 10, 1992, the Petitioners appealed the Commonwealth Court's July 9, 1992 order to the Supreme Court of Pennsylvania at No. 47 W. D. Appeal Docket 1992, where the matter remains pending. In that appeal, the Petitioners assert that the Department is unable to compel them to comply with the 1988 administrative order.

REASONS FOR DENYING THE WRIT

This case does not merit this Court's review. The issue presented in Section 1 of the Petition was not raised at all before the state courts below. The state courts did not reach the issue presented in Section 2 of the Petition, the constitutionality of retroactive application of a state regulation, because they determined that the regulation had not been applied retroactively. Both issues are likely to be moot if the Petitioners prevail on the appeal that remains pending before the Supreme Court of Pennsylvania.

Petitioners point to no conflict between decisions of lower tribunals that may be resolved through the disposition of this case. The matter at issue involves the enforcement of Pennsylvania statutes and regulations in unique circumstances at a single surface mine. Among the unique circumstances that cloud the legal issues that the Petitioners raise are the facts that the Petitioners' mining operations had direct physical impacts on all three of the discharges at issue, and

the special conditions in the mining permits that the Petitioners still hold directly require the Petitioners to treat the Frenchville mine discharges. The Petition for Writ of Certiorari contains no indication that the issues raised have the kind of national importance that might make them worthy of this Court's attention. Indeed, the Petition does not indicate that any similar situation has arisen even within Pennsylvania.

The Department briefly demonstrates below that the issues presented in the Petition are patently without merit. The administrative order at issue is not retroactive because it requires the current permittee for a surface mine to treat existing discharges from the mine so that they meet the current water quality criteria. Even if construed to have retroactive effects, the order clearly satisfies the applicable due process standards because it constitutes a rational means of achieving the legitimate goal articulated by the Pennsylvania Legislature of preventing and eliminating stream pollution in Pennsylvania. The Petitioners' new-found theory that the purely remedial, administrative enforcement action at issue here conflicts with decisions of this Court concerning criminal prosecutions for constitutionally-protected activities is ludicrous. Indeed, the reliance in the Petition upon three decisions of this Court that the Petitioners never cited below confirms that the Petitioners have gone to desperate lengths to concoct a reason for granting review.

1. The Federal Questions Presented in the Petition Were Not Raised and Passed Upon by the State Courts Below.

The Opinion of the Commonwealth Court of Pennsylvania below states that the Petitioners raised two issues: 1) Equitable estoppel/laches; and 2) retroactive application of the law. *Ingram v. Department of Environmental Resources*, 141 Pa. Commw. Ct. 324, 330-33, 595 A.2d 733, 736-377 (1991), *petition for allowance of appeal denied*, ___ Pa. ___, 607 A.2d 257 (1992). (Appendix to Petition for Writ of Certiorari, pp. A-11 through A-17) The Commonwealth Court rejected the Petitioners' equitable estoppel/laches claim solely on state law grounds without mentioning

the Fourteenth Amendment to the United States Constitution or due process. (Appendix, pp. A-11 through A-15)

Petitioners have abandoned the doctrines of equitable estoppel and laches. Instead, they contend in Section I of the Petition, for the very first time, that requiring them to remove pollutants from the Frenchville mine discharges conflicts with this Court's decisions in *Marks v. United States*, 430 U.S. 188 (1977), *Cox v. Louisiana*, 379 U.S. 559 (1965), and *Raley v. Ohio*, 360 U.S. 423 (1959). Without doubt, this issue was not properly preserved for review.

The Petitioners did not cite a *single* decision of this Court in either the opening brief or the reply brief that they submitted to the Commonwealth Court of Pennsylvania. In light of this fact, the Petitioners show unbelievable hubris in accusing the Commonwealth Court of having "misinterpreted, misapplied and ignored precedents of this Court[.]" (Petition, p. 32) The Petitioners now claim that the Commonwealth Court's ruling was plainly at odds with *Marks*, *Cox*, and *Raley*, yet they cited none of those three decisions in the 46-page Petition for Allowance of Appeal that they submitted to the Supreme Court of Pennsylvania.[5] Nevertheless, the Petitioners have the audacity to accuse the Supreme Court of Pennsylvania of having "ignored" the three decisions that the Petitioners themselves did not cite. (Petition, p. 19)

The second issue that the Petitioners raised before the Commonwealth Court, retroactivity, had two components. The first component was the contention that the Department had applied the mine discharge regulation, 25 Pa. Code § 87.102, retroactively. Invoking the strong presumption under Pennsylvania law against retroactive application of regulations, *e.g.*, *R & P Services, Inc. v. Department of Revenue*, 116 Pa. Commw. Ct. 230, 234-35, 541 A.2d 432, 434 (1988), the Petitioners asserted that a retroactive

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[5] The only decision of this Court that the Petitioners cited below was the century-old case of *Hurtado v. California*, 110 U.S. 516 (1884), which they cited in their Petition for Allowance of Appeal to the Supreme Court of Pennsylvania to support the rudimentary proposition that "[t]he United States Supreme Court has long recognized that the due process clause of the Fourteenth Amendment of the United States Constitution was intended to protect the individual from the arbitrary exercise of the powers of government." (Appendix, pp. A-81 through A-82)

construction of the regulation was impermissible under state law. (Appendix, pp. A-104 through A-109)[4] The second component was the claim that in the circumstances presented, retroactive application of the regulation violated the guarantee of due process under the state and federal constitutions. (Appendix, pp. A-109 through A-115)

The Commonwealth Court never reached the second, constitutional question. Rather, it held that the Department's application of its current regulation to existing mine discharges did not constitute retroactive application of the law at all. *Ingram v. Department of Environmental Resources*, 141 Pa. Commw. Ct. 324, 332, 595 A.2d 733, 737 (1991). (Appendix, pp. A-15 through A-17) The Supreme Court of Pennsylvania declined to review that determination. *Ingram v. Department of Environmental Resources*, __ Pa. __, 607 A.2d 257 (1992). *Cf. Clark v. Jeter*, 486 U.S. 456, 460 (1990)(determination of whether Pennsylvania statute applied retroactively was matter of state law). The courts below simply did not reach the issue of whether retroactive application of the mine discharge regulation satisfies the due process standard of furthering a legitimate legislative purpose through rational means. Petitioners offer no compelling reason why this Court should decide an issue that the courts below found no need to address.

II. The Decision of the Commonwealth Court of Pennsylvania Upholding a Purely Remedial Administrative Order Does Not Conflict With This Court's Decisions in *Marks*, *Cox*, and *Raley*

This Court's decisions in *Marks*, *Cox*, and *Raley* have nothing to do with this case. All three decisions involve *criminal* prosecutions for conduct that implicated fundamental constitutional rights, thereby

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[4] Petitioners repeated this assertion in their Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. (Appendix, pp. A-86 through A-88)

raising due process concerns to their pinnacle.[5] In contrast, the administrative order at issue in this case is purely remedial -- it merely requires the Petitioners to remove pollutants from the three Frenchville mine discharges. Not only have no *criminal* charges been filed against the Petitioners, the Commonwealth of Pennsylvania has not even sought to impose *civil* penalties against them. And unlike *Marks*, *Cox*, and *Raley*, this case involves purely economic activity, which evokes minimal due process scrutiny. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976)(*citing Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955)).

Petitioners' assert that they were "entrapped" because they believed that water quality standards found in a regulation that was rescinded in 1982 would *forever* govern any discharges from the Frenchville mine. But the permit conditions quoted in the Statement of the Case (pp. 3-4, above) gave Petitioners ample warning that they could be required to treat discharges from the Frenchville site "to neutrality until eliminated." Furthermore, one of the leading decisions in Pennsylvania environmental law, *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 319 A.2d 871 (1974), which was issued two years before mining began at the Frenchville site, clearly forewarned Petitioners that even after the operations at a mine ceased, discharges from the mine would have to satisfy newly-enacted water quality standards. *Id.*, 455 Pa. at 393-403, 416-18, 319 A.2d at 873-77, 884-85 (Fourteenth Amendment did not preclude Commonwealth from applying 1970 statute to discharge from underground mine that had been closed and properly sealed in 1969). So warned, the Petitioners could in no sense have been "entrapped" by the Commonwealth of Pennsylvania.

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[5] Two other decisions of this Court cited in Section I of the Petition similarly involve criminal prosecutions for conduct that implicates specific constitutional rights. *See Rabe v. Washington*, 405 U.S. 313 (1972)(per curiam)(prosecution under obscenity statute for exhibition of motion picture); *Boute v. City of Columbia*, 378 U.S. 347 (1964)(prosecution for criminal trespass arising from sit-in protest against refusal to serve blacks in drug store restaurant).

III. Issuing the Current Permittee of a Surface Mine an Order that Applies a Regulation Promulgated in 1982 to Mine Discharges Existing in 1988 is not an Unconstitutionally Retroactive Application of the Law.

A. The 1988 Administrative Order Did Not Apply the Law Retroactively.

The Department's 1988 administrative order cited the three Frenchville site discharges for being in violation of the effluent limits listed in Section 87.102 of the regulations governing surface coal mining in Pennsylvania, 25 Pa. Code § 87. 02.[6] Section 87.102 was promulgated in 1982 as part of the Department's successful effort to obtain primary jurisdiction over surface mining in Pennsylvania from the United States Department of the Interior. By its terms, Section 87.102 applies only prospectively to discharges, like those cited in the 1988 administrative order, existing on or after its effective date of July 31, 1982. *See* 12 Pa. Bull. 2382, 2473, 2517 (July 31, 1982).

It is well settled that "[a] statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Reynolds v. United States*, 292 U.S. 443, 449 (1934). In this case, the Department need only point to *present* facts and conditions to support its application of Section 87.102.

The Department has not, as the Petitioners claim, applied a new regulation to past mining operations. Rather, the Department has required the *current* permit holders, the Petitioners, to treat discharges that *currently* are emanating from the Frenchville mine so that those discharges comply with the *current* regulations governing

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[6] The excerpts from Section 87.102 that are quoted at pages A-74 to A-76 of the Appendix to Petition for Writ of Certiorari are from the version of the regulation that was in effect when the administrative order was issued in 1988. Amendments to the regulation went into effect roughly one year ago upon their approval by the United States Department of Interior. *See* 20 Pa. Bull. 3383, 3413-14 (June 16, 1990)(text of amendments), 21 Pa. Bull. 3316, 3321 (July 27, 1991)(effective date). These amendments do not materially alter the effluent limits that were cited in the 1988 administrative order.

discharges from surface mines. The fact that the present discharges, and not past mining operations, are the focus of concern is conclusively demonstrated by the fact that if the discharges either did not exist or met the current effluent limits, the 1988 administrative order simply would not have been issued.

The analysis of this issue by the Commonwealth Court of Pennsylvania was right on the mark. Finding that "[t]he stream pollution which emanates from the Frenchville site formerly mined by the [Petitioners] is a continuous and ongoing occurrence," the Commonwealth Court held that the Department's 1988 administrative order was not an attempt to apply the law retroactively but rather an application of "current regulations to a current violation[.]" *Ingram*, 141 Pa. Commw. Ct. at 332, 595 A.2d at 737. Other courts similarly have held that environmental laws, like the regulation at issue here, that require correction of current, harmful conditions are not retroactive even if the acts giving rise to the conditions took place before the law went into effect. *See, e.g., American Mining Congress v. United States Environmental Protection Agency*, 965 F.2d 759, 769-70 (9th Cir. 1992) (new regulations governing storm water discharges from inactive mines are not retroactive because they do not penalize owners of inactive mines for either past mining activities or contaminated discharges that occurred in the past); *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 741 (8th Cir. 1986)(Resource Conservation and Recovery Act "is not retroactive because it imposes liability for the *present* and *future* conditions resulting from past acts")(emphasis in original), *cert. denied*, 484 U.S. 848 (1987).

B. Any Retroactive Effects of the 1988 Administrative Order Satisfy the Constitutional Standard of Furthering a Legitimate Legislative Purpose Through Rational Means.

Even if they have retroactive effects, laws "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality" that can be overcome by one complaining of a due process violation only by proving that the lawmaker acted in an arbitrary and irrational way." *Turner Elkhorn*, 428 U.S. at 15.

Such a law is not unconstitutional "solely because it upsets otherwise settled expectations," even if it does so by "impos[ing] a new duty or liability based on past acts." *Id.* 428 U.S. at 16 (citations omitted). Although retroactive civil legislation may violate due process if it is "harsh and oppressive," *Welch v. Henry*, 305 U.S. 134, 147 (1938), this Court has made it clear that the "harsh and oppressive" standard "does not differ from the prohibition against arbitrary and irrational legislation that [was] clearly enunciated in *Turner Elkhorn*." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984). Under this standard, retroactive application of a civil law satisfies due process if "a legitimate legislative purpose [is] furthered by rational means." *General Motors Corp. v. Romein*, ___ U.S. ___, 112 S. Ct. 1105, 1112 (1992)(citing *Gray*, 467 U.S. at 730).

Petitioners have made no effort to demonstrate that any retroactive effects of the application of the Section 87.102 effluent limits in this case cannot be "justified by a rational legislative purpose." *Gray*, 467 U.S. at 730. One of the statutes pursuant to which Section 87.102 was promulgated, Pennsylvania's Clean Streams Law,[7] has as one of its stated objectives "not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted." Pa. Stat. Ann. tit. 35, § 691.4(3) (Purdon 1977). It cannot be gainsaid that the 1988 administrative order, which requires the removal of pollutants from mine discharges that flow into streams in Pennsylvania, serves this rational, laudable legislative purpose.

Given that the prevention and elimination of stream pollution are legitimate legislative objectives, the only remaining question is whether the Department has sought to achieve those objectives in a rational manner. *Romein*, 112 S. Ct. at 1112; *Turner Elkhorn*, 428 U.S. at 18-19. In this case, the Department has placed the responsibility for treating the discharges emitted by the Frenchville mine upon a party that extracted between 50,000 and 100,000 tons of coal from the mine, physically affected all three discharges during its

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[7] *See* 12 Pa. Bull. 2473 (July 31, 1982)(listing statutory authority for promulgation of surface coal mining regulations).

mining operations, and continues to hold the only mining permits ever issued for the site. In so doing, the Department cannot be said to have "acted in an arbitrary and irrational way." *Id.* at 15. As a result, even if it is thought to place burdens upon the Petitioners' mining retroactively, the Department's 1988 administrative order satisfies the requirements of due process. *See Gray*, 467 U.S. at 733.

CONCLUSION

For the reasons presented above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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